

R E P O R T S

OF

CASES

ARGUED AND DETERMINED,

IN THE

Court of Common Pleas,

AND

OTHER COURTS,

FROM TRINITY TERM, 56 GEO. III. 1816.

TO TRINITY TERM, 57 GEO. III. 1817,

BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters.

By WILLIAM PILE TAUNTON,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW.

VOL. VII.

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1819.

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A

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Page 775. Marginal note, line 5, dele "a loss."

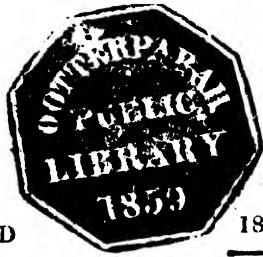
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- 464. *Abitbol v. Bristow*, dele marginal note, and insert:—
"In an action on a policy, an averment that after loading the cargo the ship sailed on the voyage and was lost, is not supported by evidence that while the ship was loading, she was driven from her moorings and lost."

J U D G E S
OF THE
COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

The Right Hon. Sir VICARY GIBBS, Knt. Lord Ch. J.
Hon. JOHN HEATH, Esq.
Hon. Sir ALAN CHAMBRE, Knt.
Hon. Sir ROBERT DALLAS, Knt.
Hon. Sir JAMES ALLAN PARK, Knt.
Hon. CHARLES ABBOTT, Esq.
Hon. Sir JAMES BURROUGH, Knt.



CASES

ARGUED AND DETERMINED

1816.

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

TRINITY TERM,

In the Fifty-sixth Year of the Reign of GEORGE III.

MEMORANDUM.

EARLY in this term *John Hullock*, of *Gray's Inn*, Esq. was called to the degree of the Coif, and gave rings with the motto *Auspicium melioris Ævi*.

EVERETT v. COOCH.

March 9.

[*2]

THIS was an action of *assumpsit* against the Defendant, as the treasurer appointed under a turnpike act, 55 G. 3., for repairing the middle division of the road from *Royston* to *Wandsworth* bridge, and from *Huntingdon* to *Somersham*. The Plaintiff averred that on the day of the first meeting of the trustees therein appointed, he was the lessee under a lease, granted by virtue of former acts, of the tolls received at the *Godmanchester* gate, at the annual rent of 685*l.*, for a term of three years; that the new act enacted, that on the day of the first meeting of the trustees for carrying that act into execution, the then existing

Where a turnpike act directed that if any person had cause of action against the justices, he should sue the treasurers: Held that the action against the treasurer was substituted only for such action as might be maintained against the

whole body of trustees, and that an action would not lie against him for the act of five trustees, though they formed a *quorum*.

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B

lease

1816.

EVERETT
v.
COOCH.

lease of the tolls, payable at the *Godmanchester* gate, should determine; and if the lessee thereof should make it appear, or prove, to the trustees, that any loss or injury would be sustained by him in consequence thereof, then any five or more trustees were authorised and required to make a just and fair compensation and satisfaction for the same, to the lessee; that the Plaintiff's lease of the tolls at *Godmanchester* gate, was thereby determined; that the Plaintiff afterwards made it appear, and proved, to the trustees, that a loss to the amount of 112*l.* 10*s.* was sustained by him in consequence of his lease having so determined, by reason whereof, and by force of the new act, the trustees became liable to make a fair and just compensation and satisfaction to the Plaintiff for such loss, and being so liable, they, in consideration thereof, afterwards promised the Plaintiff to make him such compensation, when requested; that 112*l.* 10*s.* was a fair compensation, whereof the trustees had notice, and were requested to pay, but had not paid. This cause was tried at the *Huntingdon* Spring assizes 1816, before *Wood, B.*, when it appeared, that the act referred to contained a clause, of which the substance is above correctly alleged, and also enacted, that if the trustees should neglect or refuse to make a fair and just compensation for any loss and injury which might be sustained by vacating the lease, such compensation should and might be sued for in any court of record at *Westminster*, and also a clause, "that in case any person should deem himself aggrieved by any thing done by the trustees under that act, he should sue the treasurer." The Defendant was treasurer, and the Plaintiff had been lessee of the tolls at the *Godmanchester* gate, for a term, of which, when nine months were unexpired, the Plaintiff delivered to the trustees, at their first meeting, upon their request, an account of his receipts; by which he made it appear, and offered to prove, that he made a profit of 150*l.* *per annum* by that gate, claiming that the whole receipts, after deducting the rent, were his profit, and he required a compensation on that basis. The trustees thought his demand too high, and said they must postpone the consideration of the compensation till the new tolls were leased, and adjourned the meeting, promising to consider of it. At the adjournment the Plaintiff became the highest bidder for the new tolls, upon terms which were more beneficial to him than the lease of the old tolls had been, and the trustees, thinking that the net profits under the new lease exceeded the whole receipts under the old lease, in-

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formed

formed the Plaintiff that they considered the benefit which he would thereby receive, to be a sufficient compensation for the loss he had sustained by vacating the old lease. *Frere*, Serjt. for the Defendant, objected that the Plaintiff was not entitled to recover, because he had not proved, by evidence to the trustees, the extent of his damage. *Wood*, B. thought that the account exhibited had sufficiently made some damage appear, and that it sufficed if one branch of the alternative were satisfied. The Defendants then offered evidence of the value of the new leases; *Wood*, B. thought that the measure of compensation was the value of the old lease, and that whether the Plaintiff, or a stranger, were the tenant of the new tolls, and what was the value of the new lease, was a matter wholly irrelevant. The jury found a verdict for the Plaintiff, with 156*l.* 13*s.* 6*d.* damages, subject to a point reserved.

Frere, Serjt., in *Easter* term obtained a rule *nisi*, either to set aside the verdict, and enter a nonsuit, or to arrest the judgment.

Blosset, Serjt., shewed cause against this rule. First, the new lease was no compensation: the Plaintiff was the purchaser of it at its full value, being the highest bidder. Next, when the trustees awarded to the Plaintiff, as compensation, that which is no compensation, they were guilty of a refusal to compensate. If the Plaintiff at first demanded too much, that did not discharge them from giving what he was entitled to. Next, the action given by the statute is not an action for damages for not compensating, but an action for the compensation itself. Debt lies upon any statute which gives an advantage to another for the recovery of it (*a*). And where debt formerly lay, *indebitatus assumpsit* may now be maintained. The action is properly brought against the treasurer, because the statute so directs. And an express promise by the trustees, is both averred in the declaration, and is supported by evidence of an express promise; but if evidence of the express promise were wanting, it would be intended after this verdict.

Per Curiam, stopping *Frere*. The act puts the treasurer in the place of the trustees, but this action supposes that if the act had not substituted the treasurer, the Plaintiff might have sued the entire body of trustees. The act of those trustees who were present at the meeting, and promised, would not render the whole body liable to an action. This is a strange clause, and the Plaintiff is under great difficulties; but the only office of

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v.
COOCH.

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(a) *Co. Dig. Dett. A. 9.*

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 COOCH.

the Court at present, is to decide whether this form of action can be maintained. It cannot be upheld, as being confirmed by the verdict, because the objection was taken at *nisi prius*. We will not undertake to say whether the legislature may not have introduced, with intention to give a remedy, a clause which proves ineffectual, but, as the case stands, there must be judgment of

Nonsuit.

June 15.

EDMUNDS v. WATSON.

A Defendant, whose goods have been taken under a *feri facias*, is entitled to call on the sheriff to return the writ, whether the goods have been sold to another, or redeemed by himself.

COPLEY, Serjt., had obtained on behalf of the late sheriff of York, upon the authority of *Alchin v. Wells* (a), a rule *nisi* for discharging a rule, whereby the Defendant called on the sheriff to return a writ of *feri facias*, under which the sheriff had seized a boat of the Defendant's, and had, by the Defendant's special authority, delayed to sell, and had retained the possession, until the Defendant afterwards paid the debt, and costs and poundage, which the sheriff insisted on receiving before he would give up the possession of the boat: the Defendant had commenced an action against the sheriff for extortion, in furtherance of which, he wished to obtain the evidence of the sheriff's return.

Shepherd, Solicitor-General, shewed cause. Wherever the sheriff under the *feri facias* has levied the money, he is bound to return the writ. In this case he has seized the goods, though he has not sold them, but the owner has redeemed them, and that is a levy under the *feri facias*: the sale is no necessary part of a levy, or at least the owner may be the purchaser of his own goods.

Copley, Serjt. in support of his rule. This is precisely *Alchin v. Wells*; there the Court held there must be no poundage, because there had been no actual sale.

GIBBS, C. J. The Defendant is entitled to have the writ returned, for this reason; the sheriff must return that he has levied the money, and shew what he has done with it, viz. that he has paid it over to the Plaintiff; it will then appear that the Defendant is discharged, but until then, the Defendant may be in some danger of further proceedings: but let it not be sup-

(a) 5 Term Rep. 470.

posed that we now decide whether the sheriff is, or is not entitled to the money which he has received for poundage: we give no opinion on that subject, I take it to be clear, that where the Plaintiff delivers a writ to the sheriff to be executed, and money is paid to the sheriff by the owner of the goods, the Plaintiff is entitled to be called on the sheriff for a return of the writ; and the right of the Defendant is reciprocal.

Rule discharged, but without costs.

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EDMUNDS
v.
WATSON.

AGUTTER v. WILSON.

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June 15.

COPLEY, Serjt., had obtained a rule *nisi* to discharge the Defendant out of custody, upon the ground that in the weekly allowance of 3s. 6d. which the Plaintiff was bound to make him, there had been delivered a *French* sixpence.

Onslow, Serjt. showed cause upon the ground that this sum had been paid to the turnkey for the Defendant's use, and that the turnkey had accepted the coin in question without objection, and that though the Defendant, relying on a similar transaction in a former week, had never accepted any part of this sum, yet that, through the turnkey's agency, the Defendant had waived the objection.

But *The Court* held that the *French* sixpence was clearly not a good payment, because it was not the money of this country, and that the turnkey was not, for this purpose, such an agent of the Defendant, that his acquiescence could bind the Defendant, and made the

Rule absolute.

If a creditor, who detains a Defendant in custody, pays any part of his weekly allowance in a spurious or foreign coin, as *e. g.* a *French* sixpence, the Defendant is entitled to his discharge.

The turnkey of a prison is not such an agent for a prisoner confined in execution, that by his acceptance of spurious coin in part of the prisoner's allowance, he can bind the prisoner.

HILL v. the Sheriff of MIDDLESEX.

[8]

June 18.

IN this action it was necessary to prove who was the bailiff to whom a warrant was delivered to be executed. That fact has often been proved by producing the writ with the bailiff's name indorsed thereon, and by evidence that his name has been

indorsed, apparently by the sheriff's authority, the name of the bailiff employed to make the levy, is no evidence to prove who was the bailiff so employed by the sheriff, evidence not being added that the indorsement of the bailiff's name on the writ itself was made by the sheriff's authority.

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HILL
v.

The Sheriff of
MIDDLESEX.

so written thereon by some one in the sheriff's office authorized so to do, at the time when the warrant has been returned. Upon the trial of the present cause, at the *Westminster* sittings after the last terms, before *Gibbs*, C. J. the Plaintiff produced only an examined copy of the writ, which had been returned *non est inventus*, and filed; on the back of the copy, indeed, was written the copy of a name, which was proved by external evidence to be the bailiff's name; but there was no evidence that the name indorsed on the writ itself was written thereon by any person authorized so to do. *Gibbs*, C. J. therefore held that this copy was no evidence to prove that the warrant was made to that bailiff, and nonsuited the Plaintiff; and on this day, upon motion made to set aside the nonsuit by *Lens*, Serjt. who observed that in the only two reported cases on the point, *Macneil v. Perchard* (a), and *Blatch v. Archer* (b), the objection never was taken, the Court held that the evidence was properly rejected, and

Refused the rule.

(a) 1 *Esp.* 263.(b) *Cowp.* 63.

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June 19.

DOE, on Demise of LOCKE, v. FRANKLIN.

Where a landlord defrays the cost of defending an ejectment in the name of an illiterate tenant, who gives a *retraxit* of the plea and *cognovit* of the action, the Court will set aside the *retraxit* and *cognovit*, and permit the lessor to defend as landlord.

THE Plaintiff having obtained from the Defendants in possession, who were merely nominal Defendants, [their landlord defending the ejectment at his own expense, though in the tenants' names,] a *cognovit* of the action, and a *retraxit* of the plea, and having signed judgment thereon; *Shepherd*, Solicitor-General, had obtained a rule *nisi* for setting aside the judgment, and delivering up the *retraxit* and *cognovit* to be cancelled, and for admitting the landlord to defend on the common rule.

Vaughan, Serjt. showed cause, and contended, that, as the landlord had not obtained a rule to defend as landlord, the Defendants were, *sui juris*, to manage their cause as they would; but the Court said, that as the Plaintiff knew the cause was conducted by the landlord's attorney, and at his expense, and these poor labourers knew nothing about the matter, the judgment ought to be set aside.

Rule absolute.

1816.

MASON v. CORDER.

June 20.

THIS was an action brought by the Plaintiff to recover damages from the Defendant for the non-performance of an agreement made on 8th *April*, after inspection by the Defendant of a lease, to purchase the residue of the term therein granted, of a farm; and it was stipulated that the Plaintiff would assign to the Defendant or his nominee, the residue of that term*, and that the Defendant should, on the 28th *April*, pay 180*l* for manure, and, on 29th *September*, pay for growing grass, clover, and tares, at 5*l*. *per acre*, and that the growing wheat and beans should be then valued, and paid for on 25th *December*: the Defendant was to have immediate possession. He paid 100*l*. on account, upon an understanding that the landlord would assent to any thing that was reasonable, and was let into possession, and received the custody of the lease, which he submitted for examination to his solicitor: he afterwards objected, that it contained a covenant not to assign without the lessor's permission in writing, and to certain other obnoxious covenants. The parties treated with the lessor for a new lease to the Defendant, which should not contain similar covenants, in lieu of the present lease; but as the lessor would grant only a lease containing all the same covenants, the Defendant would not accept it. The lessor had declared that he was willing to accept any respectable tenant. The Plaintiff had written to the Defendant tendering an assignment, but no evidence was reported of the tender of any written license for it from the lessor. The Defendant occupied the land until after the harvest, when he quitted the farm; the declaration averred that the Plaintiff had always been ready, and offered to assign, but that the Defendant had refused to nominate an assignee, or accept an assignment, or to pay the residue of the price. *Abbott*, J. before whom the cause was tried at the *Chelmsford* Spring Assizes, 1816, thought that the Defendant had, by his conduct, waived his objections to the obnoxious covenants: and that if the jury thought the lessor would have granted a new lease, or consented to an assignment of the old one, the Defendant was bound to take it. The jury found a verdict for the Plaintiff.

It is incumbent on the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment.

Semle that a condition cannot be released upon condition. *Per Gibbs*, C. J.

Under a contract for the purchase of the residue of an old term, a purchaser is not bound to accept a similar new lease; for the former differs in value from the latter, the residue of an old term being in certain respects more advantageous.

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Copley, Serjt. in *Easter* term moved for a rule *nisi* to set aside the verdict, and have a new trial, upon the ground that the objection

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jection to the covenant not to assign went to the very root of the title, and therefore could not have been waived by the Defendant's possession; but he admitted that the attention of the learned Judge had not been distinctly called to this view of the case: he also moved in arrest of judgment, that the Plaintiff had not shewn on his count that he was able to assign the lease, or to make a good title to it. He cited *Philips v. Fielding* (a), *Luxton v. Robinson* (b), *Duke of St. Alban's v. Shore* (c), *Martin v. Smith* (d).

Best, Serjt., now shewed cause against this rule. He contended that a similar lease, to be newly granted by the lessor, was not the thing contracted for, but an assignment of that lease, which the Defendant had inspected before his purchase, and therefore could not object to any of the covenants it contained. He intimated that if the lessor had given his consent to the assignment in conditional or restrictive terms, he might, notwithstanding the doctrine of *Dumpor's* case (e), have restrained the Defendant from subsequently assigning without consent, and the practice of lessors was such (f). It was no part of the bargain that the Defendant should have liberty to re-assign; and an assignment which would leave the Defendant at liberty to assign over, would not be the same lease contracted for. He admitted that, according to *Lloyd v. Crisp* (g), it was incumbent on the Plaintiff to obtain the lessor's consent to the assignment, but said, that at the trial there was abundant evidence, though it did not appear on the report, that the Plaintiff had obtained the lessor's fullest consent to the assignment. He insisted, however, that it was unnecessary for the Plaintiff either to aver or to prove either possession or title; for inasmuch as days certain were fixed for payment of the several instalments, it was no condition precedent to the payment of the money, that the lessor's consent should be obtained, or the assignment first executed or tendered, *secus* where the money was agreed to be paid upon having a title and assignment, for which he cited *Pordage v. Cole* (h), and *Smith v. Woodhouse* (i). Upon the construction of this agreement, there was as much ground to say that the assignment was intended to precede the

(a) 2 H. Bl. 123.

(b) 2 Doug. 620.

(c) 1 H. Bl. 270.

(d) 6 East, 556.

(e) 4 Co. Rep. 119.

(f) *Gibbs*, C. J. intimated that there would be great difficulty in effectuating such a restriction, for that the doctrine in *Dumpor's* case is, that the condition is indivisible.

(g) *Ante*, v. 249.

(h) 1 Wms. Saund. 319. c.

(i) 2 New Rep. 233.

first instalment, as any of the rest ; but it was clear, by the term that possession was to be instantly given, while the first instalment did not become due till 28th April, that the assignment was not to precede the first instalment, and therefore was not a condition precedent to any of the payments.

Copley, who would have supported his rule, was stopped by the Court.

There is a wide difference, according to *Dunpor's* case, between the purchase of the residue of a term under a lease which contains a condition against alienation without licence, accompanied with a licence for the assignment, and a new lease for the like term, containing a similar condition: for, according to that case, the condition not to alienate is, by the licence, gone for ever ; and therefore this Defendant might well refuse to accept, in lieu of the residue of the old term, a new lease, subject to such a condition as the lessor insisted on ; an assignee, too, has a right to get rid of his responsibility by assigning over, and therefore the value of the residue of the term differs in that quality also from a new lease. The grievance of which the Plaintiff complains by his declaration, is the Defendant's failure to accept an assignment of the term ; it is incumbent on the Plaintiff to shew that he had done all which was requisite on his part, namely, as was held in *Lloyd v. Crisp*, that he had obtained the lessor's consent in writing to the assignment, which is not distinctly proved, though the agreement is sufficiently stated in the declaration. The Plaintiff would escape the necessity of resting on the points on which his case has been argued, if there were before the Court distinct evidence of the lessor's specific consent to the assignment contracted for : it has been fairly argued for the Plaintiff, and it does appear manifest from the circumstances, that like as in judges' reports of a trial, many things are often taken for granted, which must necessarily have passed, but were thought not disputable, so it may have happened in the present case. This action cannot be maintained, unless the Plaintiff did offer, and was able, and shewed that he was able, to do that for which he had agreed. The Plaintiff's counsel admits, and in so doing, he has not admitted too much, that it lay on him to procure every thing necessary to make his assignment valid, namely, his landlord's consent. He has admitted also that the obtaining a derivative lease would not be tantamount, for it would leave the Defendant subject, as lessee, to burthens to which the assignment would not leave him liable.

Possibly

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1816. Possibly the Plaintiff may prove that circumstance on another trial, which does not appear on this report, that the Plaintiff was in a condition to procure, and did procure, that which he was bound to procure, the assent of the lessor.
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 Rule absolute for a new trial, on payment of costs.

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(IN THE EXCHEQUER-CHAMBER.)

June 20.

Dwyer v. GURRY and Others.

Upon a contract to replace stock, and pay dividends in the mean time, though the jury give damages for the value of the stock, and the amount of the dividends, yet, upon affirmation in error of the judgment, the measure of increase is not the further dividends that may have accrued, but interest on the damages given as the value of the capital stock.

UPON the affirmation in error, in the Exchequer-chamber, of judgment in an action on promissory notes, and also on a special agreement made by the Defendant to replace stock in the funds, which had been lent him, and in the mean time to pay half-yearly sums equal to the dividends, as they accrued, the verdict comprising interest on the notes, and dividends on the stock, up to the time of the verdict, *West* moved for interest, (not for further dividends,) on all the capital sums recovered, up to the time of the affirmation.

Rule absolute.

(IN THE COMMON PLEAS.)

June 22.

HUTTON and Others, Assignees of STROMBOM, a Bankrupt, v.
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The owner of a vessel has no lien for the hire stipulated by charter-party for the voyage, on the goods shipped by the charterer; because the latter is the owner of the ship for the voyage, and the first owner has no possession of the ship or goods, without which there can be no lien.

IN trover for 70 pipes of wine, averred to be the property in the first count of the bankrupt, in the second, of the Plaintiffs as his assignees, at the sittings after *Michaelmas* term 1815, at *Guildhall*, before **Dallas, J.* a verdict was found for the Plaintiffs, subject to a case. The Plaintiffs were the assignees of *J. Strombom*, who committed an act of bankruptcy on 5th *May*,

voyage, and the first owner has no possession of the ship or goods, without which there can be no lien.

1815, and against whom, on 25th *August*, a commission issued. The Defendant, on 30th *September*, 1814, chartered his ship the *Neptune* to the bankrupt, for a voyage from *London* to the *Cape of Good Hope*, where, after delivering the outward cargo, she was to take in another for *London*, the master having liberty to reserve the cabin for his sole use, and the usual accommodation for his crew and ship's stores; and 70 running days being allowed for loading and discharging the homeward and outward cargoes: the bankrupt covenanted to pay the Defendant or his assigns freight for the voyage out and home, 2100*l.*, with 5 *per cent.* primage; to be paid, one-fourth thereof by bills on *London* at two months, one-fourth by like bills at four months from clearing out from the custom-house of *London*, one-fourth by government or approved bills on *London* within 10 days after discharging the cargo at the *Cape*, and the remainder by bills at three months from the vessel being reported inwards at the port *London*: the freighter had liberty to keep the ship on demurrage — days, paying 3*l.* 13*s.* 6*d.* *per day* in *London*, and 7*l.* 7*s.* abroad; and for the due performance of the charter-party, the owner bound the vessel and her freight, and the freighter bound the goods to be laden on board her. The ship cleared out from *London* on 29th *October*, 1814, addressed to *Reynolds* and *Murray*, the bankrupt's correspondents at the *Cape*. On 16th *March*, 1815, she arrived there, and on the next day was reported to *Reynolds* and *Murray*, and at the custom-house: on 16th *April* she completed her discharge of the outward cargo, on 18th began to take in her return cargo, and on 12th *May* completed it: on 16th *May* she cleared from the *Cape*, on 8th *August* arrived in *London*, and was reported inwards at the custom-house; and on 25th *August* finished the discharge of her homeward cargo. The return cargo consisted of goods of various persons, (for which the master signed the usual bills of lading, deliverable to them on paying freight to the bankrupt's order,) and of the 70 pipes of wines in question, which were shipped by *Reynolds* and *Murray*, on the bankrupt's account, and consigned to him; of which 18 pipes were loaded on 3d *May*, 14 more on 5th, and 38 on 8th *May*; and all of them were, by bills of lading dated 13th *May*, made deliverable to order or assigns, on payment of freight to the order of the shippers, as *per* indorsement; and the bills of lading were indorsed to the order of the bankrupt. Some of the goods were loaded in the cabin and steerage of the ship, reserved by the charter-

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charter-party, the freight of which, agreeably to the bills of lading for them, amounted to 60*l.* 5*s.* 1*d.* On 2d Nov. 1814, the Defendant drew two bills on the bankrupt for 55*l.* 6*s.* each, being each one-fourth of the freight and primage, at two and four months' date respectively, payable to the order of the Defendant, which the bankrupt accepted. The master of the *Nep-tune* received from *Reynolds* and *Murray*, as the bankrupt's agents, at the *Cape*, another sum of 55*l.* 5*s.*, being one other fourth of the freight and primage. For the remaining one-fourth, no payment had been made or bill given. The two bills, dated 2d Nov., were presented for payment when due, and dishonoured. When the first of them, viz. at two months' date, became due, it then and still was in the hands of *Heath* and *Hawkins*, who had discounted it for the Defendant, and who, on its being dishonoured, debited the Defendant with the amount, and at the instance of both the Plaintiff and the Defendant, agreed to hold the bill. Previous to the second of those bills, viz. that at four months, becoming due, it was arranged between the Defendant and the bankrupt, that two other bills for 55*l.* 5*s.* each, should be drawn by the Defendant, and accepted by the bankrupt; that the Defendant should negotiate such bills, and that out of the monies he would raise by so doing, the original bill at four months should be retired. In pursuance of such arrangement, two other bills, one at six months' date from 2d Dec., 1814, and the other at five months' date from 3d March, 1815, each for 55*l.* 5*s.* were drawn upon, and accepted by the bankrupt; and out of monies raised on those bills, the Defendant paid the original bill at four months, and delivered it over to the bankrupt, and the same was now in the possession of his assignees. The bankrupt also drew on the Defendant two bills amounting together to 53*l.* 14*s.*, viz. one for 300*l.* at nine months, and one for 231*l.* 14*s.* at 12 months, from 1st March, 1815, which were accepted by the Defendant, and which were considered as the balance due from the Defendant to the bankrupt in respect of the two last-mentioned acceptances of 55*l.* 5*s.* each, after satisfying the original bill at four months, difference of the interest, and charges. The bankrupt's two last-mentioned acceptances for 55*l.* 5*s.* each, at five and six months' date, were also dishonoured: the former was taken up by, and was now in the hands of the Defendant, the latter was outstanding, as well against the Defendant, as against the bankrupt. On 8th August, 1815, the Defendant caused the 70
pipes

pipes of wine to be landed out of the ship, and entered in his own name in the *London* docks. Previously to the commencement of this action the Plaintiffs had demanded the wine, and at the same time tendered to the Defendant 701*l.* 10*s.* in satisfaction of any lien or demand he might have on them; the Defendant, contending that he had a lien for the outstanding acceptances, and also for the cabin and steerage freight, and the demurrage, as well as for the last fourth part of the freight and primage, or an approved bill for the amount, and that, at any rate, the tender made him was not equal to the lien upon the wines, and refused to deliver them. The amount of the demurrage and detention, supposing the detention taken at the same rate as the demurrage specified in the charter-party, was 257*l.* 6*s.*; the specified demurrage was 147*l.* If the Court should be of opinion that the Plaintiffs were entitled to recover, the verdict was to stand, the Plaintiffs undertaking to pay such part of the 701*l.* 10*s.* as the Court should determine the Defendant's lien to amount to. If otherwise, a nonsuit to be entered.

Best, Serjt., for the Plaintiffs, contended that they were entitled to recover the whole, without deduction. First, the Defendant had no lien, for lien cannot subsist except in cases where payment is to be made on delivery; but here is a covenant for payment by instalments at days certain, the last of which is to be made by a bill to fall due at a period long subsequent to the delivery of all the cargo. It will hardly be contended that the Defendant had a right to retain the cargo until that bill was mature and paid. *Buller*, J. lays it down (a), that "no person can in any case retain, where there is a special agreement, because then the other party is personally liable." In that case, if he wishes to retain his lien, he must specially reserve it in his agreement. With respect to the clause by which the cargo is bound for the freight, and which, according to Lord *Ellenborough*, C. J. (b) and to an eminent living writer (c) is borrowed from the maritime law of foreign countries, there is in *England* no mode of obtaining under that clause the specific security of the ship for performance of the owner's engagement, though the admiralty courts of foreign countries are said to decree against the ship *in specie*: and inasmuch as the remedy by lien could not be reciprocal, because the owner of the goods never

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(a) *Bremin v. Currant*, *Trin.* 23 G. 2. Bull. N. P. 45.(b) *In Birley v. Gladstone*, 3 Maule & Selw. 216.(c) *Abbott on Shipping*, 4th edit. 119. and 190, 191.

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has possession of the ship, it is to be concluded that neither does that clause give the owner of the ship any lien on the goods, which he would not have if that clause did not exist. In *Phillips v. Rodie* (a) it was held, that where the freight was to be paid on delivery of the homeward cargo, by a bill at three months, the ship-owner had no lien, either for dead freight or or liquidated demurrage. And in *Birley v. Gladstone* (b), where the clause subsisted, that for true performance the parties bound themselves, especially the ship-owners the ship, and the freighter the goods to be laden, each to the other in a penal sum; it was held that the ship-owner had no lien either for dead freight, demurrage, or freight of goods shipped but relanded by compulsory process of foreign law: and Lord *Ellenborough*, C. J. mainly relies on the want of mutuality in the remedy, as an argument that the remedy by lien does not exist. It was argued at the trial that this was a case of mutual credit; and indeed if the Defendant has any claim at all, it must rest on that principle, which, according to *Olive v. Smith* (c), not only swallows up all cases of lien, but comprehends many other cases. It is now too late to argue that goods may not be intrusted on mutual credit as well as money, but it must at all events be confined to a credit given before the act of bankruptcy. Only 18 pipes of wine were shipped before the 5th of May, on which day the act of bankruptcy happened, and to those only must the mutual credit be confined, for the act of bankruptcy will be taken to have been either prior to the delivery of the 14 pipes of wine shipped on the 5th, or contemporaneous with it, since the law cannot presume any division of a day, unless the Defendant, on whom the burthen of that proof lies, shows upon the evidence that the act of bankruptcy preceded the shipping of the wines (d). But even though the wines were on board, no bills of lading were signed deliverable to the bankrupt's order, till the 13th, until which time therefore the goods were deliverable to the shippers, *Reynolds* and *Murray*, not to the bankrupt. Or even if the bills of lading bear relation to the time of shipping, and these are therefore the goods of the bankrupt, and not of *Reynolds* and *Mur-*

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(a) 15 East, 547.

(b) 3 Maule & Selw. 205.

(c) 5 Taunt. 56.

(d) *Quære* whether the difference of meridian between *London* and the *Cape* would not be sufficient evidence to raise a presumption that the shipping of the wines preceded the act of bankruptcy, inasmuch as, by reason of the difference in the meridian, the morning, and probably the hours of transacting business thereon, would begin several hours sooner at the *Cape* than in *London*?

ray, yet the bankrupt, having by his act of bankruptcy lost all control over the goods, could not, by putting them on board, confer on the master who brings them home, the right of lien, any more than he could dispose of them by sale or any other species of pledge. Lien is in its nature a pledge, either tacit or express. But further, the loading these goods on board was not a credit within the meaning of this act. The ship was chartered to the bankrupt: the ship, crew, and officers were therefore his for the voyage, and for that period he was completely put in the situation of the owners, so that the goods never came into the possession of the owner of the ship: while this vessel was so chartered, the owner had no right to board her and unload the cargo. The first possession he had of the goods was the tortious possession which he acquired when he landed them in the *London* docks. In *Vallejo v. Wheeler* (a) it was held that the owner of a ship, who had chartered her to another, had nothing to do with the ship during the voyage, but that he who had taken her on charter was the owner for that turn.

Lens, Serjt., *contra*, contended that the proposition had been laid down much too widely by the Plaintiffs' counsel, that where there was a special agreement, the right of lien could not subsist. To produce that effect, the special agreement must do much more than merely stipulate the price, it must contain some terms inconsistent with the continuance of the lien; for instance, every master of a vessel signs bills of lading, in which there is a specific agreement to deliver to the consignees, "he and they paying freight," yet that was never held to discharge the lien; but sometimes there is a stipulation, that the freight shall be paid at a certain time after arrival: that is wholly inconsistent with the continuance of the lien, and destroys it; so, if freight be paid for by a bill, which is afterwards dishonoured, things revert to their former situation; and if the goods are still in the custody of the ship-owner, the lien continues. In this case the Defendant therefore has clearly a lien, at least for the first two instalments; for neither the bills originally given for them, nor the bills substituted on the dishonour of the first, were paid. In *Stevenson v. Blacklock* (b), it was held that bills given for an attorney's bill of costs, being dishonoured, his lien on the client's papers, which subsequently came into his hands, revived. *Cowell v. Simpson* (c) was much urged *contra*, but it

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(a) 1 Cowp. 143.

(b) 1 Maule & Selw. 542.

(c) 16 Ves. 275.

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was replied, that in that case the bills were still running, and while they were pending, they superseded the lien. A right to detain for the future event of bills, is inconsistent with giving bills. *The giving bills for the specific payment arising on the general contract, will therefore not stand in the way, but if the bills become valueless, the Defendant's lien on the goods stands precisely on the same grounds as if no bills had been given. The intrusting the bankrupt with the Defendant's ship might in one sense create a mutual credit, but the Defendant does not rely on that. Considering this as a case of lien, the credit was complete, as to at least 18 and 14 pipes of wine, before the bankruptcy. The Defendant, claiming under the general authority of the bankrupt, is entitled to the whole, unless the Plaintiffs can show when the general authority ceased. These assignees, who represent the bankrupt, have no right to carve for themselves, and take one part and repudiate another. The goods, while in foreign countries, are not within the reach of a commission of bankrupt. It is the Defendant who brings them within the Plaintiffs' reach, and they cannot take them without affirming and paying for the Defendant's act of bringing them, without whose labour and service the goods would never have arrived, nor the assignees have had the benefit thereof. Had the Defendant known that the assignees would not avow the act, he would never have brought them hither. The bankrupt might have repudiated the contract, and refused to pay the freight, on the ground that the Defendant did not bring them hither for his benefit, but for the benefit of his assignees; for the gross sum which is stipulated for the voyage is, in effect, the price of bringing these specific goods hither. The assignees, coming in under the bankrupt, have only the same qualified right on the goods which the bankrupt has, viz. to take them, performing the condition on which only the bankrupt could take them, that is, paying the freight. As to the argument that this was the bankrupt's possession, and that the Defendant had no right to take the goods, though the charterer is, *pro tempore*, the owner with relation to other freighters, yet, as between these parties, he stands in the condition of a freighter; this ship has been employed to fetch these wines from the Cape, it is the Defendant's master who brings them, and he ought, on account of all persons entitled to the goods, to abstain from delivering up the goods to the Plaintiffs, except on payment of the freight. The making

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making the stipulation as to the price, will not, according to the case of *Parish v. Crawford* (a), exempt the owner from his liability, even to a stranger, who puts goods on board on freight, on a contract with the charterer; and if the owner is still subject to the liability, it is a consequence that he retains the beneficial rights which result from his original character of owner.

Best, in reply. The sum claimed by the Defendant is not the freight of these goods, but the hire of the entire ship out and home. It never was yet heard of that an homeward cargo could be detained for payment of the freight of the outward cargo. The homeward freight of all the wines is only 230*l*. Upon the question of lien, the case of *Stevenson v. Blacklock* confirms the doctrine of *Buller, J.* and *Bacon's Abridgement* (b) is strong to the same effect. "If a person who would otherwise have a right to detain the personal chattel of another, for the trouble or expense he has been at concerning it, contract to be paid a sum certain for the trouble or expenses, he thereby waves the right of detaining the chattel." *Stevenson v. Blacklock* differs from this case. The deeds came into the attorney's hands, upon the general dealing between attorney and client. And the bill was not given upon any previous or specific agreement, but as payment; and when it ceased to be payment, then it was no bar to the lien. Lord *Ellenborough, C. J.*, there lays down the law, that "where there is an express antecedent contract between the parties, a lien, which grows out of an implied contract, does not arise." Here is that express antecedent contract. *Parish v. Crawford* has been overruled in the cases of *Fraser v. Marsh* (c), where it was cited by *Park, J.*, then of counsel, *Mackenzie v. Rowe* (d), and *James v. Jones* (e). (*Acc. per Curiam.*) This agreement contains no expression whence it can be inferred that the parties intended the lien should be preserved; and it is material that it stipulates, not only for the price, but for the manner of payment. Next, as to the delivery, no case has been cited that a delivery to a chartered ship is a delivery to the owner of the ship. A ship is under the control of the charterer. He may direct when the voyage shall begin. The freight is, according to all bills of lading, to be paid, not to the owner, but to the charterer. The freight must, if tendered at all, be tendered, not to the owner, but to the bankrupt,

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(a) 2 Str. 1252. *fusiis*, *Abbott on Shipping*, 4 Ed. 22.(b) 6 Bac. Abr. *Trover*, E. 696.

(c) 13 East, 238.

(d) 2 Campb. 482.

(e) *Abbott on Ship.* 4 ed.

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who is the charterer. There is therefore, 1st, no lien: 2dly, the goods never got into the possession of the Defendant, but by the Defendant's own act, which cannot create a lien. And the Plaintiff is therefore entitled to judgment without tendering the 700*l*.

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GIBBS, C. J. It will not be necessary for me to enter into the consideration of the difference between the goods loaded before, and those loaded after the act of bankruptcy, nor to consider the question, inasmuch as some of the goods were delivered on the day of the bankruptcy, whether of those two acts preceded the other. We decide on a general ground. On the question, whether there be or be not any lien whatever in the Defendant, the Plaintiff contends that the Defendant has no lien, on one particular, and one general ground; he insists, on the authority of a case in *Buller's Nisi Prius*, that wherever there is a specific agreement for the price of the thing to be done about the goods, there the party has no lien; that here, by the charter-party, a specific sum is to be paid in a specific manner, and that therefore no lien exists. With respect to that proposition, it is not true that a lien cannot exist where there is a stipulation for a particular sum to be paid for that which is to be done about goods. I am not prepared to say whether a lien may, or may not exist, in a case where not only a specific sum, but a specific mode of payment is stipulated for, as for example, by bills payable at certain periods. We decide on the more general ground, that there is no lien whatever under the circumstances of this case. The Defendant is the owner of a ship, the bankrupt is the charterer of the ship; and for one sum of 2100*l* to be paid at different periods, he was to have the whole use of this ship for the voyage out to the *Cape of Good Hope*, and home to *London*. It is clear that he might have put this up as a general ship, have filled her with the goods of other persons, and when they come home, the Defendant could not have touched those goods by way of detaining them till his freight was paid him by the charterer. But here, it is contended, inasmuch as these are the goods of the charterer put on board by himself, the Defendant might detain these goods till those dishonoured bills were paid by the charterer. He could not have had this right, unless he had a lien on the goods: he could not have a lien on the goods, unless he had in some sort the possession of the goods: here, he had no possession of the goods whatsoever. No case is produced, that bears directly on the subject, and we must consider the case

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case on principle. If *Parish v. Crawford* had stood unimpeached, I should have thought it a strong authority, that the possession of the chartered ship remained with the owner, because of his liability to those who put their goods on board. It certainly was there held, that one who put his goods on board by the consent of the charterer, might recover for the loss of the goods, not against the charterer, by whose authority he loaded them, but against the owner. But that case has frequently been questioned, and in two cases, formally overruled. I therefore attribute no weight to that case. It is well known that an owner cannot be guilty of barratry. In a case (a) before Lord Mansfield, C. J., a question arose on an insurance cause, whether the charterer could commit barratry; and it was held that he was the owner of the ship for the voyage, and being such, he could not commit barratry in any other character. In the present case, the consignor is a bankrupt: he was the owner of this ship for the voyage. He puts his own goods, then, on board his own ship, and the master and crew ought to have obeyed his orders for the voyage. Lord Hardwicke, Chancellor, in *Paul v. Birch* (b), says "the sum reserved is improperly termed freight, for it is rather for the hire of the ship." It is, indeed, more like rent than freight. If, then, the bankrupt be owner for the voyage, and if it be the duty of the master and crew to obey the owner's instructions, when the bankrupt puts his own goods on board his own ship, the master and crew ought to obey him until the voyage is ended, which is not until a full delivery is made of the goods; and until that time the possession of the ship does not revert to the owner. I am therefore of opinion that the Plaintiff is entitled to his judgment.

DALLAS, J. If in this case it were necessary to pronounce an opinion upon the several points which have been argued at the bar, I, for one, should be solicitous to take more time to look into them. But where several grounds are taken in a case, some of which are doubtful, but others clear, if the case can be decided on the latter, it is unnecessary to go into the former. I agree with my Lord that there is in this case no possession in the Defendant, and there can be no lien, unless there is a possession. It may be considered that the charterer of a ship is during the existence of the charter-party to all intents and purposes the owner of the ship: the bankrupt had put these goods on board in that character, and the Defendant had no legal right

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(a) *Vallejo v. Wheeler*, Cowp. 143.(b) 2 *Ath.* 622.

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to resume the possession of the ship until the goods were unloaded, and therefore he had no right to detain the goods.

PARK, J. It is unnecessary, for the reasons assigned by my Lord Chief Justice, for me here to enter into the questions made at the bar. The first question is, then, whether the Defendant had any possession of the goods? for, if he had no possession, he had no lien. On the first day of the argument the judgement of *Lee, C. J.*, in the case of *Parish v. Crawford* was cited. In *James v. Jones* it was not necessary to overrule it in terms, but the last-mentioned judgment is wholly inconsistent with the former case. In *Mackenzie v. Rowe*, Lord *Ellenborough* also, on consideration, differs from *Parish v. Crawford*. In a subsequent case, *Fraser v. Mursh*, the point was not the same, but the attention of the Court was called to *Parish v. Crawford* and *James v. Jones*, and the Court decided adversely to the former case; for these reasons I am of opinion with my Lord and my brother *Dallas*, that in this case there ought to be

Judgement for the Plaintiff (a).

(a) *Burrough, J.* was absent.

June 2.

AUSTEN v. HOWARD.

It is no plea in debt on a replevin bond, that the bond purported to be entered into by two sureties, but is executed only by the Defendant.

DEBT by the Plaintiff, who was the sheriff of *Surry*, on a replevin bond, which, on oyer, purported to be given by *Bromley* together with the Defendant and *Hyde Brown*, jointly and severally, to the Plaintiff, by his name of office, but was executed by the Defendant and *Bromley* only. The Defendant pleaded that *W. Stanton* had distrained the goods in the bond mentioned for rent due to him from *Bromley*; that the Plaintiff was sheriff, and as such, on the usual complaint and application, made by *Bromley*, caused deliverance to be made to *Bromley* of the goods distrained; and on that occasion, *Bromley* and the Defendant, as his surety in that behalf, executed that bond to the Plaintiff as sheriff; and that the bond was executed by the Defendant and *Bromley* only, and not by *Hyde Brown*, or any other person. The Plaintiff generally demurred.

Lens, Serjt., of his counsel, was stopped by the Court.

Best, Serjt., argued in support of the plea, that replevin bonds were wholly the creatures of the statute 11 G. 2. c. 19. s. 23.
which

which enacts that “sheriffs may and shall in every replevin of a distress for rent, take in their own names a bond from the Plaintiff and two responsible sureties.” The word “shall” is imperative, and the bond is to be given by two sureties, and the sheriff is neither authorized nor required to take a bond in any other form. It is the sheriff himself who sues here, and he cannot be permitted to recover on a bond which he has taken in one form, when the statute prescribes another. 2dly, The want of *Brown’s* execution materially varies the condition of the obligor, for if the bond be executed by both sureties, and one is compelled to pay the whole, he may sue his companion for contribution, which benefit here the Defendant loses. No case has decided that such a bond is good.

GIBBS, C. J., preventing *Lens’s* reply.—The statute of *Westminster* has prescribed forms, in which alone, when a party is arrested, the sheriff shall take a bond for the Defendant’s appearance at the return of the writ; and all other bonds are taken for ease and favour. But replevin is not within that statute. The sheriff was always enabled to replevy goods, taking security for their return. And the party distraining has a remedy over against him, for taking insufficient pledges: and the stat. 19 G. 2. c. 11. s. 23. gives a particular bond; but I am far from thinking that the statute avoids the power the sheriff had before that statute, to take security for the return of the goods, if judgment should be given *pro retorno habendo*. As to the other point made by the Defendant’s counsel, that there can be no action for contribution, the same objection would hold in the case of every bond intended to be joint, which is not executed by all parties; yet I will venture to say, such a plea was never heard of.

Judgement for the Plaintiff.

JACKSON v. WICKES.

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June 22.

IN debt on a bail recognizance, the Defendant pleaded, that since the judgment against the principal, no *capias ad satisfaciendum* had been sued out against the principal, and duly

Where a Plaintiff in his replication avers a record of the same Court, he may at once

pray that the Court will inspect the record, without giving the Defendant an opportunity to rejoin by traversing the record, and making a perfect issue between the parties.

executed,

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executed, as, according to law and the immemorial custom of this Court, before the commencement of this suit, there ought to have been. The Plaintiff replied, that since the judgement he had sued out a *capias ad satisfaciendum*, which he set out, as by the said writ of *capias ad satisfaciendum*, and return thereof duly returned and filed, would appear; and that he was ready to verify by the record, and prayed that the record of the writ, and the return thereof, might be seen and inspected by the Court now here. The Defendant demurred, assigning for cause, that the replication concluded with a prayer that the record might be inspected by the Court, whereas there was no issue joined between the parties, whether there were or not such a record remaining in the Court; and that the replication concluded, as if there were an issue joined, whereas no issue was joined: and that the Plaintiff had introduced new matter by setting out the record of the writ, whereto the Defendant must plead in rejoinder before the issue could be perfect, but that by the conclusion of a prayer to the Court to inspect the record, the Defendant was excluded from so doing.

Vaughan, Serjt., in support of the demurrer.

Pell, Serjt., *contra*, was relieved by the Court.

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GIBBS, C. J. The Defendant has the full benefit of every possible rejoinder which he could make, for a day must be given to inspect the record.

PARK, J. In *Creamer v. Wickett (a)*, the pleadings were exactly similar to this, and the Plaintiff prayed the record might be inspected, being, like this, a record of the same Court, and it was held good: and the like in many other cases.

Judgement for the Plaintiff.

(a) *Carth.* 517. *S. C.* 1 *Lord Raym.* 550. *acc.*; and see *Moor v. Bail of Carrett*, 2 *Salk.* 566. *Dy.* 227, *b.* 228, *a.* Some other points relative to the pleading of records may also, doubtless, be learned from the cases of *Filewood v. Popplewell*, 2 *Wils.* 66. *Underhill v. Devereux*, 2 *Saund.* 72, *note.* *Henderson v. Withy*, 2 *Term Rep.* 576. *Chandler v. Roberts*, 1 *Doug.* 58. *Adney v. Vernon*, 3 *Lev.* 243. *Sandford v. Rogers*, *Barnes*, 161. *S. C.* 2 *Wils.* 113.

June 25.

Earl FITZWILLIAM v. MAXWELL.

The costs in a feigned issue under an inclosure act which contains no special direction as to costs, abide the event, by the statute of *Glocester*, as in other actions of *assumpsit*.

BY a local and personal act, 52 G. 3. c. cxliii. "for draining, inclosing, and improving *Borough fen common* and the *Four*

hundred

hundred Acre common, in the county of *Northampton*, and for forming the same into a parish to be called *Newborough*; and for building and endowing a church for such parish;" in "case any person interested should be dissatisfied, he might have the matter of any claim or objection tried at law, and for that purpose might cause an action to be brought against any commissioner, or person in whose favour such determination should have been made in one of the courts at *Westminster*, the verdict or verdicts which should be given therein should be final, binding, and conclusive upon all persons, unless the Court should set aside such verdict, and order a new trial. And after verdict obtained and not set aside, the commissioners should and were thereby required to act in conformity thereto, and to allow or disallow the claims or objections thereby determined, according to the event of such trial." Earl *Fitzwilliam*, a commoner, was Plaintiff in a feigned issue, whereby he denied that the Defendants, who were devisees in trust of the estate of the *Marquis of Exeter*, were seised in fee of the soil of the commons, they being entitled by the act, if such were their title, to one 20th part of the commons in lieu thereof. Upon the trial, at the last *Northampton* assizes, a verdict was found for the Defendants. The prothonotary taxed the Defendants' costs for them at 600*l.*, holding that the costs followed the verdict, though the act was silent respecting costs.

Lens, Serjt., now moved that the prothonotary might review his taxation, and disallow the Plaintiff's costs, upon the ground that, inasmuch as this statute was subsequent to the statute of *Glocester*, no costs could be given by that statute; and that no judgment could be entered up, or at least none was necessary, because the act directed that the verdict was conclusively to guide the commissioners.

GIBBS, C. J. Will not these costs spring out of the statute of *Glocester*? In our view of the case, we cannot look to the circumstance of the action being on a feigned issue: all we can look to is, that it is an action on a wager, and the costs follow of course. The verdict may be a sufficient guide to the commissioners, but the Plaintiff recovers nominal damages, and is entitled to enter up judgment in this, as well as in any other action. On the Plaintiff's view of the subject, the judgment would be erroneous. We can see no ground to give even a rule *nisi* for it.

Rule refused.

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Earl FITZ-
WILLIAM
v.
MAXWELL.

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1816.

DEVAYNES v. BOYS.

June 23.

In an action against a magistrate for assault and false imprisonment, after the general issue pleaded, the Court will permit the Defendant to withdraw his plea and pay money into Court, pleading *de novo*.

THIS was an action for assault and false imprisonment, brought against the Defendant, who was a magistrate of the Cinque Ports. The declaration was of last *Hilary* term, and the general issue was pleaded in the same term. The issue was delivered in *Hilary* vacation with notice of trial. The statute 24 G. 2. c. 44. s. 4. gives a magistrate who is a Defendant, power, if he has neglected to tender amends before action brought, to pay into court at any time before issue joined, such sum of money as he shall think fit.

Best, Serjt., had, on a former day, obtained a rule *nisi* to withdraw the Defendant's plea pleaded, upon payment of all costs subsequent to the time of pleading, and to plead the same *de novo*, accompanied with a payment into court of the money which the Defendant wished to tender.

Shepherd, Solicitor-General, shewed cause against this rule.

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Best, in support of the rule, urged that although in this case, by common law, the Defendant could neither make a tender before action brought, nor pay money into court after action brought; yet, since by the stat. 24 G. 2. the legislature gives a new tender before action brought, and permits the money to be paid into court before issue joined, there is the same reason here, as there is in cases where tender and payment into court are by common law, that if it is requisite to pay money into court after plea pleaded, the Court should permit it to be done, as in cases at common law, through the medium of their permission to withdraw the plea of the general issue, and to pay money into court, pleading *de novo*. The Court for a moment doubted, whether, in a case where the Court should give leave to unjoin an issue joined in *Hilary* term, the new issue, when joined, would be an issue joined as of *Hilary* term, or of this present term. In the former case, the indulgence could not be granted. But having satisfied themselves on that point, they held, that though it was not in their power to enable a Defendant to pay money into court after issue joined, *i. e.* not after issue was effectually joined, yet it was in the power of the Court to rescind that which the Defendant had hastily and inadvertently done, and to send the parties back to an earlier stage of the cause, when they might plead again, and pay the money into court, and join issue on the plea. The Court therefore might grant this motion.

Rule absolute.

DENN

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June 26.

DENN, on the Demise of B. RICHARDSON, v. HOOD and Others.

ON the trial of this ejectment before *Thomson, C. B.*, at the *York Lent* assizes, 1816, a verdict was taken for the Plaintiff, subject to a case, which in substance stated, that *Richardson* being seised in fee, devised to his wife *Hannah Richardson*, all his real and personal estates whatsoever, that is to say, his land, houses, and all other buildings, situated at *Stamford Bridge*, in the county of *York*, upon his estate, and likewise all his household furniture, and stock in trade, unto the said *Hannah Richardson*. The testator had no other real estate than at *Stamford Bridge*; he had debts owing to him, and those, together with his furniture and stock in trade, constituted his personal estate. The lessor of the Plaintiff was the only son and heir-at-law of the testator; *Hannah Richardson*, who had survived the testator, was lately dead, having, by her will, disposed of all her real estates at *Stamford Bridge* aforesaid, and the Defendants were the devisees under her will, and tenants in possession. The question for the Court was, whether *Hannah Richardson* had acquired, by the will of *T. Richardson*, an estate in fee, or for life, in the real estate thereby given. If in fee, a nonsuit was to be entered; if for life, the verdict was to stand.

Devise of all my estate real and personal whatsoever, that is to say, my land, houses, and all other buildings, situate at *S.* on my estate, and likewise all my household furniture and stock in trade, carries a fee in the lands at *S.*

Lens, Serjt., for the Plaintiff, argued, that though "all the testator's real and personal estate" was abundantly sufficient to pass a fee, yet that the testator had himself restrained the words from carrying that meaning, by his own explanation, which shewed that he used them only as words of local description. This case was distinguishable from *Roe*, on demise of *Child*, v. *Wright* (a). In *Barry v. Edgeworth* (b), the Master of the Rolls thought that in a devise of the testatrix's estate and lands in *C.*, the word "lands" was descriptive of the locality, and the words "all my estate" of the interest, from which it might be inferred, that if the word lands had not been there used, in contradistinction to the word estate, all her estate at *C.* would only have been descriptive of the subject, not of the interest devised. In the *Touchstone* (c), it is laid down that, *Verba posteriora propter certitudinem addita, ad priora, quæ certitudine indigent sunt referenda*. The latter words here are therefore to be considered as substituted for the former. *Doe*, on demise of *Bates*, v.

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(a) 7 East, 252.

(b) 1 Eq. Cas. Abr. 178. pl. 18. S. C. 2 P. Wms. 523.

(c) *Shepherd's Touchstone*, lit. Grant, p. 253., 6th ed.

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Clayton (a), was a very complicated case, and perhaps has little bearing on this; but it was there held that the word estate did not carry a fee, where, by other antecedent words, it appeared to be restricted to locality. The word estate is not here applied as it was in *Holdfast (b)*, on demise of *Cowper, v. Marten*, where "my estate in *Braywick*" was held to carry a fee.

Shepherd, Solicitor-General, denied that here was any substitution of the latter words for the former. He was stopped by the Court.

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GIBBS, C. J. After the cases which have been recently decided on this question, it is unnecessary to hear the Defendant's arguments. It is true, that formerly these words would have received a narrower construction than we at this day put on them. It is true, that formerly, if the word estate were accompanied by words which pointed at locality, it would not have been held to carry a fee; but later cases, decided on the apparent, or very probable, intent of the testator, have held, that the word estate would pass a fee, notwithstanding that there were words of locality joined with it. One of the first was that cited, of "my estate at *Braywick*." So, that devise in *Doe*, on demise of *Child, v. Wright (c)*, "all my estate, freehold and copyhold, lying and being in *Ellington* in *Huntingdonshire*;" no case could be stronger than that for the inference that the testator was pointing out only the local situation; but the Court held that he meant by "estate," the quantity of interest he meant to convey, and by the words at *Ellington*, the description which was to identify the lands. So here, by "all my estate," the testator means, according to the doctrine of the late cases, to designate the *quantum* of interest; and lest the parties should not know where to find the property, he adds the local description, my land is at *Stamford Bridge* in *Yorkshire*, my houses are on the land, and my furniture is in the houses. I think, therefore, there is no ground to hold that these words passed less than a fee. The other three judges concurring,

Judgement for the Defendant.

(a) 8 *East*, 141.(b) 1 *Term Rep.* 411.(c) 8 *Term Rep.* 64.

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NEILSON, Ex parte.

June 26.

HEYWOOD, Serjt., moved for an order to discharge the Defendant *Neilson* out of the custody of the sheriff of *London*, under the stat. 48 G. 3. c. 123. s. 1., which enacts, that "all persons in execution upon any *judgement, in whatsoever court the same may have been obtained, for any debt or damages not exceeding the sum of 20*l.* exclusive of the costs, recovered by such judgement, and who shall have lain in prison for the space of twelve successive calendar months next before the time of their application, shall, upon application for that purpose, in Term-time, made to some one of his Majesty's superior courts of record at *Westminster*, to the satisfaction of such Court, be forthwith discharged out of custody as to such execution, by the rule or order of such Court. He produced an affidavit of the prisoner, that his debt was under 20*l.*, and that he had been twelve calendar months in prison (of which fact he also produced a certificate from the sheriff), and had given the Plaintiff notice of the present motion. It did not appear that it was to be a rule to show cause, for the statute says, that he shall forthwith be discharged by the order of the Court, provided the application be to the satisfaction of the Court.

On a motion for the discharge of an insolvent debtor under the statute 48 G. 3. c. 123. s. 1., the rule is in the first instance only a rule *nisi*.

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Per Curiam. We have given more consideration than we otherwise should have done to a case of sort, because we always wish to be more particularly careful in the case of prisoners. We had not, from the first, a particle of doubt, that this ought to be a rule to show cause; in addition to the other reasons which weighed with us, we now learn, that from the time when this act passed (and applications under it were not unfrequent until the late act gave prisoners their liberation after three months' imprisonment), upon every application made in this court, under this act, a rule *nisi* only has been granted in the first instance.

Rule *nisi*.

1816.

June 21.

GROSE v. WEST and Others.

Primâ facie the presumption is, that a strip of land lying between a highway and the adjoining inclosure, is, as well as the soil of the highway *ad medium filum viæ*, the property of the owner of the inclosure.

But if the strip of land communicate with open commons or other larger portions of land, the presumption is either done away, or considerably narrowed, for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them.

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THIS was an action of trespass for breaking and entering the Plaintiff's close, called *Penpont Down*, and taking away 500 loads of soil. Upon the trial of the cause at the *Launceston* Spring assizes 1816, before *Park, J.*, it appeared, that the Plaintiff was the owner and occupier of a farm called *Penpont Barton*, whereof a tract of land called *Penpont Down* had immemorially been a part: this down abutted on the boundary hedge of the Defendant's farm, called the *Tregildas* estate; and a turnpike road, which had been made about twenty-four years since, passed from *east* to *west*, over the down, in a direction parallel to and a few yards distant from the boundary hedge of the *Tregildas* estate, so that a narrow strip of land, abutting on the hedge, and extending in length the whole length of the down, was marked off by the road from the residue of the down; before this turnpike was made the road had described an arc, of which the *Tregildas* hedge was the cord, so that the space of land intercepted between the road and the *Tregildas* hedge was then much larger than it now was. At the points where the road entered and where it quitted the down, there were, and long had been, gates, erected and maintained by the Plaintiff and those whose estate he had, to keep the *Penpont* cattle within the down, and to exclude others from it. The occupier of *Penpont Barton* had not only had the exclusive pasturage of the down, as well on the one side of the road as on the other, but had also, as long as could be remembered, particularly availed himself of the valuable shelter afforded by the hedge of the *Tregildas* estate, to fodder his cattle close under it, during winter, on the intercepted strip of land. The occupiers of *Penpont Barton* had also, for the space of fifty years and more, spread their straw in the highway on *Penpont Down*, to be trampled into muck, and had again collected the mud and straw from the road into heaps at the side, some part on the side next the *Tregildas* hedge, and some part on the other side, and had again carried it away and applied it as manure upon other parts of *Penpont Barton*, which acts the occupiers of the *Tregildas* estate had frequently witnessed, but never interrupted. The Plaintiff also proved declarations by a former owner of the *Tregildas* estate, that the intercepted strip of land was not his, but the property of the owners of *Penpont Down*. The Defendants

fendants had recently taken away from the side of the road a large quantity of soil and mud which the Plaintiffs had scraped together, and turf and earth dug from the intercepted strip of land, and applied it as manure on the *Tregildas* estate. The Defendants proved that the owners of the *Tregildas* estate, had frequently cut turf on the strip of land in question, and had therewith repaired *Tregildas* hedge, adjoining thereto; and also, that the surveyors of the highways had of late years sometimes scraped up the mud from the road, on the one side and on the other, and had given notices to the Defendants, requiring them to remove that part of it which lay on the side of the road nearest to the *Tregildas* estate, and that the Defendants also had spread straw in the road, for the purpose of being trodden into muck, and, after mixing it with mud from the road-side, had carried it back and employed it as manure on the *Tregildas* estate. The jury, contrary to the inclination of *Park, J.*, found a verdict for the Defendants.

Lens, Serjt., in *Easter* term, obtained a rule *nisi* to set aside the verdict, and have a new trial, against which

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Pell, Serjt., now showed cause: he relied on the fact that materials had been taken for repairing the *Tregildas* hedge, and on the repeated acts of ownership of the Defendants in taking manure from the road without interruption, in presence of occupiers of *Penpont Down*, who had an interest to dispute it; and on the judgment of the surveyors of the highway, whereby they had awarded to the Defendants the mud on the side next the *Tregildas* estate; but he principally relied on the rule of presumption, that the owner of inclosed land abutting on a highway, or on small strips of waste land lying between his close and a highway, is also seised of the soil and freehold of these intermediate strips of waste, and of the road, as far forth as the central line of the highway; and this, he urged, was conclusive of the question, that the land from *Tregildas* hedge to the middle of the highway, along the whole length of *Penpont Down*, was the soil and freehold of the Defendants.

Lens, in support of his rule, was stopped by the Court.

GIBBS, C. J. The Defendants' counsel has correctly stated the law. *Primâ facie* the presumption is, that a strip of land lying between a highway and the adjoining close, belongs to the owner of the close; as the presumption also is, that the highway itself, *ad medium filum viæ*, does. But the presumption is

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to be confined to that extent; for if the narrow strip be contiguous to or communicate with open commons, or larger portions of land, the presumption is either done away, *or considerably narrowed; for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them. This strip does communicate with *Penpont Down*. The acts of ownership on which the Defendants' counsel relies, are the taking materials for repairing the fence of his field, which has been immemorially or antiently inclosed, and abuts on *Penpont Down*. He, therefore, may have had a prescriptive right to take soil there for repairing his fence, and those acts may be attributable to that prescriptive right, and not to ownership. I am aware that there is other evidence, viz. that the surveyor of the highways has, for ten or twelve years past, gathered up the dirt of the road, and that the Defendant has had it; but that is of modern usage only. But mark what a strong case the Plaintiff has; this strip of land communicates at each end with other parts of the Plaintiff's farm, and he meated his cattle close up under *Tregildas* hedge; and that, not once, but continually; for it is not pretended that this user is ascribable to and right of common. In addition to this, there is a conversation by a former owner of *Tregildas* estate, admitting that the land is not his, and wishing he had had it. It is true that the value of the fee simple may be small, but the relative value may be considerable, and the property taken appears to have been worth 40*l.* or 50*l.*, and therefore is not within the rule of this Court: that it is of too little value for a new trial. Under these circumstances, I will say no more of the case, than that it is a case unfit for the Plaintiff to be concluded by this verdict, and that therefore there ought to be a new trial on payment of costs.

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PARK, J. The case is of the more importance, because the Plaintiff's gate opens on the very spot in question, so that if the verdict stands, the Plaintiff will have a difficulty in getting in and out of his own close.

Rule absolute.

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HART, *qui tam*, v. DRAPER.

June 20.

THE Plaintiff having declared against the Defendant on the statute of usury, 12 *Ann.*, for penalties amounting to 20,445*l.*, and the cause being ripe for trial at the *Chelmsford* spring assizes 1816, the Plaintiff forbore to enter the cause for trial, upon the Defendant consenting to a judge's order, whereby it was ordered, that the Defendant should, within the first four days of the next *Easter* term, consent to a motion for compounding the action upon payment of 2000*l.* penalties, and 150*l.* costs, one half thereof to the king, and the other half to the Plaintiff, and that the Defendant should, within the first four days of the ensuing *Easter* term, pay the king's moiety into court, to warrant the motion; and if the motion were refused, should give judgment of *Trinity* term, and the cause to be tried at the ensuing summer assizes. The trial was postponed; in the next term the Defendant did not make good his payment, having drawn the Plaintiff into a subsequent agreement, fraudulent as against the crown, to waive the former agreement, and to accept, as the terms of compromise, the sum of 175*l.* for himself, and the like sum of 175*l.* to be paid to the crown. The Court, upon the application of *Best*, Serjt., for the Plaintiff, with the consent of the Attorney-General, when three weeks of the term had expired, made the judge's order a rule of court, and *Best* had subsequently obtained a rule *nisi* for an attachment, for disobedience to this rule.

Where a Defendant, consenting to a judge's order, obtains a benefit under it, the Court will, upon the order being afterwards made a rule of Court, enforce by attachment the Defendant's performance of such terms of the rule as are beneficial to the Plaintiff, Or to the crown, in a *qui tam* action.

Onslow, Serjt., now showed cause against this rule, upon affidavits exculpatory of the usury, whence he inferred, that the crown, having no real interest in the penalties, the second agreement might be permitted to take effect; at all events, the non-compliance with the first agreement was no contempt of the Court, inasmuch as no rule of court subsisted, for paying the monies agreed on within the stipulated time, until nineteen days after that time had expired: and the Defendant had a good defence to the action.

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GIBBS, C. J. This cause being ripe for trial at the spring assizes, if it had been tried, and a verdict had passed for the Plaintiff, the judgment would have been complete in *Easter* term; to avoid that trial the Plaintiff gave this consent, whereby the trial is put off, and the Plaintiff obtains the fruit of the compromise

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promise in the delay which takes place. Application is made to the Defendant to consent to such order as he has here engaged to consent to, and he refuses; whereby the Plaintiff is thrown over to the assizes after *Trinity* term. The Defendant takes to himself the benefit of that which he bargained for, and he now, by withholding his consent, refuses to pay the price of it. It does not appear to me, that there is any ground for resisting the attachment, therefore the rule must be made absolute.

Best and Copley, Serjts., in support of the rule.

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(IN THE EXCHEQUER-CHAMBER.)

June 27.

BEATSON and Others v. RUSHFORTH.

In an action against the hundred on the stat. 41 G. 3. c. 24., and 1 G. 1. st. 2. c. 5., to recover the damage sustained by the demolishing mills by persons unlawfully, riotously, and tumultuously assembled, it is not necessary to aver that the demolishing was felonious.

An action against the hundred for demolishing a mill, may be brought more than twelve months after the demolishing.

THIS was a writ of error brought to reverse a judgment of the Court of Exchequer pronounced for the Plaintiff below, in an action against the hundred, upon a declaration founded on the stat. 41 G. 3. c. 24., and which stated that after 18th April, 1801 (a), at the parish of *Halifax*, in the hundred of *Aggbrigg* and *Morley*, in the county of *York*, divers persons, to the number of twelve and more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, did unlawfully, tumultuously, and with force, demolish in part a certain water-mill of the Plaintiff below, situate in the parish, hundred, and county aforesaid, to wit, the walls, doors, windows, window-frames, locks, and hasps, affixed and belong-

(a) It was stated by *Richardson*, that the principal question which had been made in this cause in the court below, had been, whether the 8th section of the statute 1 G. 1. c. 5., to which the stat. 41 G. 3. c. 24., giving this action against the hundred, refers, and which provides that no person "shall be prosecuted by virtue of that act (1 G. 1.) for any offence or offences committed contrary to the same, unless such prosecution be commenced within twelve months after the offence committed," prescribes the same period for the limitation of actions to be brought against the hundred by virtue of the 6th section of 1 G. 1, which directs that the damage shall be raised and levied in such manner and form, and by such ways and means, as are provided by the statute 27 Eliz. c. 13. The declaration in *Hyde v. Cogan* (1) stated the pulling down to have been within twelve months. And the Court of Exchequer had holden that the 8th section did not so apply. But he said, this question did not arise on the present record.

(1) *Doug.* 699., and see *ibid.* 700. n. 1.

ing

ing thereto, and parts of the said water-mill of the Plaintiff below, and certain works, to wit, certain shears and frames, to wit, 20 shears, 20 frames, 20 machines, and 20 straps, of the Plaintiff below, belonging to the said water-mill, of great value, to wit, 500*l.*; in contempt of the king, to the damage of the Plaintiff below, to wit, to the amount of 500*l.*, and against the form of the statute, whereof the Defendants below, who then and still were four of the inhabitants of that hundred, had notice whereby, and by force of the statutes, an action had accrued to the Plaintiff below, being the person injured and damaged thereby, to recover against the Defendants below, being then and still inhabitants of that hundred, the damages by him sustained by so demolishing in part the said water-mill, and the works thereto belonging. All the other counts stated the demolishing in the same phrase. After verdict and judgement for the Plaintiff below, the Plaintiffs in error assigned for error, that it was not alleged that the persons mentioned to have been unlawfully, riotously, and tumultuously assembled, did “feloniously” demolish in any part the said water-mill and premises, nor that they did or committed any felonious act or offence in respect of the premises.

Scarlett, for the Plaintiffs in error. The statute 41 G. 3. c. 24. recites the statutes 9 G. 3. c. 29. and 1 G. 1. stat. 2. c. 5., and directs that the damages may be sued for in the manner provided by the last-mentioned act. This action must therefore be governed by the same rules which govern an action brought upon that statute. It was held in *Reid v. Clarke (a)*, that in an action on that statute, the Plaintiff cannot recover, unless the pulling down be done under circumstances which make the act amount to felony; and inasmuch as it is necessary to aver every thing on the record, which is indispensable to the Plaintiff’s recovery; it therefore ought to be averred that the demolishing was felonious.

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Richardson, for the Defendant in error, was stopped by the Court.

LORD ELLENBOROUGH, C. J. The same circumstances constitute a felony, which constitute a claim to reimbursement by the hundred in a civil action; but the statute does not say that the felonious pulling down shall be necessary to raise the claim. In the case of *The King v. Judd (b)* it was held unnecessary to state in a warrant of commitment, that the act was done felo-

(a) 7 Term Rep. 496.

(b) 2 Term Rep. 253.

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niously, if the facts set out showed a felony. In the case of *The King v. Cogan* (a), the declaration does not use the word feloniously. Those circumstances must have been proved at the trial, which were common alike to a charge of felony, and to a cause of action against the hundred.

Judgement affirmed (b).

(a) *Doug.* 699.

(b) It is not necessary to aver, or prove, that twelve persons were assembled at the riotously demolishing. *Pritchit v. Waldron*, 5 *Term Rep.* 14.

June 27.

HAGGETT v. ARGENT.

The Defendant's bail were permitted to appear by their own attorney and justify, where the Defendant's attorney refused to instruct counsel to move for them to justify.

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THE Defendant's attorney had given notice that the bail would justify on the 24th of *June*, which being a *dies non juridicus*, the bail omitted to attend then, but attended on the 25th, when *Vaughan*, Serjt., for the Defendant, obtained two days time for the bail to justify, *which time being expired, they now appeared in court. The Defendant's attorney refused to instruct counsel to move that the bail might justify, unless they could previously pay him the Defendant's costs up to the present time. This they declined to do, and *Copley*, Serjt., hereupon moved that the bail might appear by their own attorney and justify, to prevent an assignment of the bail-bond from being taken.

Vaughan, on behalf of the Defendant, opposed this application, upon the ground that the bail could not be heard, inasmuch as they were not yet in court: they sought to increase the costs against the Defendant, by continuing the action, when they had it in their power to protect themselves by surrendering the Defendant.

GIBBS, C. J. Undoubtedly the Defendant cannot change his attorney without leave of the Court, but the sheriff and the bail may appear by their own attorney. We think it may be done.

Rule absolute.

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HICKEY v. BURT.

June 27.

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MRS. Brown having employed the Plaintiff, a broker, to distrain for rent on *Burt*, her tenant, who replevied, and *Burt* and the two sureties in the replevin bond being insolvent, she sued the sheriff for taking insufficient sureties in the Plaintiff's name; he gave her leave to bring the action, and afterwards gave her notice of his intention that the action should not *proceed, which, he apprized her, he did for the purpose of giving a little time to the sheriff's officer, who was much distressed, and that when that point was gained, the action might proceed again. The Defendant had since pleaded *puis darrien continuance* a release obtained from the Plaintiff.

Where a lessor, with the permission of a bailiff, who had made for her a distress for rent, commenced in the bailiff's name an action against the sheriff for taking insufficient pledges, and the bailiff afterwards, without the lessor's privity, released to the sheriff, the Court set aside the release, and a plea thereof *puis darrien continuance*.

Best, Serjt., had, on a former day, obtained a rule *nisi* to set aside this plea, and that the release might be given up to be cancelled.

Lens, Serjt., against the rule, insisted on the Plaintiff's legal right to release the action, he referred to the case of *Bottomly v. Brooke* (a), and urged that if he were a trustee for Mrs. Brown, it was a subject of interference for a court of equity only. If indeed there were collusion, which was denied by the Defendant's affidavits, the plaintiff might reply, that the release was fraudulent, and would recover notwithstanding the release; a question which might as well be disposed of by a jury, as by a court of equity: if the release were honest, the action could not proceed. Mrs. Brown might have sued in her own name, if she would; she had never offered to indemnify the Plaintiff against the costs of the suit, and the Plaintiff might release his legal right without the leave of this Court.

Best supported his rule.

BURROUGH, J., observed that in a similar case, about ten years before, Lord Eldon, C. J., had holden, that no action could be brought in the name of a trustee, without his consent; but that if a trustee would not consent to lend his name as a Plaintiff, the Court of Chancery would, upon application, compel him to permit his name to be used; nevertheless that if an action were once commenced in the name of a trustee, he could not afterwards release it, except by leave of the Court. The Court held that if the present action had been commenced

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(a) 1 Term Rep. 621. n.

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without the Plaintiff's permission, the release might have been a trick, the fruits of which the Court possibly might not have the right to take from the Defendant; but here the Plaintiff had lent his name in the beginning, and the sheriff ought not to be permitted to arm himself with this release.

Rule absolute.

June 28.

CLENNEL v. READ and Another.

Where the assignee of a term gave up at *Michaelmas* to a second assignee the occupation of a house, and afterwards paid three-quarters of a year's landlord's property-tax, due at *Michaelmas*, and handed over the receipt to the succeeding occupier, it was held that the succeeding occupier, paying two quarters of a year's rent accruing at the following *Christmas*, might tender in part of his rent the receipt for property-tax given to the former occupier,

And might plead it as a payment made by himself.

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IN replevin, the Defendants made conusance as bailiffs of *J. Musgrave* and wife, for a distress for half of a year's rent of a dwelling-house, at 42*l.* a year, payable quarterly, due at *Christmas*, 1814, from *Ross*, as tenant thereof, to *J. Musgrave* and wife. The Plaintiff pleaded, as to 4*l.* 4*s.* parcel, &c., that it was not in arrear, and as to the residue, a tender by the Plaintiff; he also pleaded, that before the rent became due, and while *J. Musgrave* and wife were landlord and landlady, the premises were chargeable and charged with the landlord's property-tax, payable to the king; that before the distress, on 18th *November*, 1814, the Plaintiff, being then the occupier of the house, was required, and was obliged to pay, and did pay to the king, for the landlord's property-tax duly charged and assessed, *while *J. Musgrave* and wife were landlord and landlady of the house, 4*l.* 4*s.*, being after the rate of 2*s.* for every 20*s.* of the rent of 42*l.*, and which 4*l.* 4*s.* the Plaintiff was by law authorized to deduct, and did deduct, out of the rent, being the first payment to be made by him on account of the rent, and so nothing of the 4*l.* 4*s.* was in arrear. The Defendants replied to the first plea by traversing the tender; and to the second plea, they replied that the Plaintiff had not paid and was not obliged to pay the four guineas. Upon the trial of the cause at a sittings in *Middlesex*, in *Easter* term, 1816, it appeared that *J. Musgrave* had leased the premises to *Ross*, under whom *Lloyd* had occupied them for a period preceding *Michaelmas*, 1814, at which time, *Lloyd* let the Plaintiff into the occupation of them. On the 18th *November*, 1814, *Lloyd* paid to the collector of the property-tax 3*l.* 3*s.* for three quarters of a year, ending at *Michaelmas*, 1814. It was proved that the Plaintiff tendered sixteen guineas, and the collector's receipt for three guineas, which expressed that that

that sum had been received of *Lloyd*, and a like receipt for one guinea received of the Plaintiff for the property-tax, due at *Christmas*, 1814, in full for the half year's rent due at *Christmas*. It was apparent, as matter of law, that if *Lloyd* had not paid, and the collector had distrained on the Plaintiff for the tax, as he might have done, the collector would in his receipt have expressed the whole four guineas to be received of the Plaintiff. For the Defendants, it was contended, that the Plaintiff was not entitled to deduct from the rent which he was to pay, the property-tax which *Lloyd* had paid, but only the one guinea property-tax which the Plaintiff had paid for himself. The jury found a verdict for the Plaintiff, *Gibbs*, C. J., reserving liberty to move to enter a verdict for the Defendant.

Accordingly, *Lens*, Serjt., having on a former day in this term obtained a rule *nisi*, was now called on to support his rule. He urged, that for any thing which appeared in the cause, *Lloyd* might upon his last settlement have already been allowed this sum of three guineas in his account with his landlord. The case might be materially different, if the Plaintiff had been called on and compelled to pay the tax in *Lloyd's* default, but *Lloyd* pays, as he was bound to; the authority to deduct, is only for that occupier to deduct, who was occupier when the tax is levied; nothing in the act enables a former occupier to pay himself, by transferring this *chose in action* to a succeeding tenant. The Plaintiff never in fact did pay, nor was ever required to pay this sum, and the transfer contended for, may make a material difference in the accounts already settled between *Lloyd* and *Musgrave*, the lessor, or in the accounts between the lessor and the Plaintiff.

GIBBS, C. J. We must take it as proved, that the Plaintiff was let into possession of the premises by *Lloyd*, and therefore was liable for every thing for which *Lloyd* was liable. It is not necessary for us to consider how this case might have been varied (though I do not say that it would have been varied), if there had been any thing in the case which would enable the lessor to say, "that he had repaid the tenant the property-tax in another mode." The statute (a) enables the tenant to deduct the duties out of the first payment thereafter to be made on account of rent. The tenant here consists of two persons, *Lloyd* and the Plaintiff: of whom *Lloyd* was in possession at the time when the principal part of the tax became due, and the Plain-

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v.
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(a) 46 G. 3, c. 65. ss. 74. Sched. A. No. 4. Rule 9.

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tiff is the person who is to make the next payment. It is therefore, not too much to say, that as to the four guineas, nothing here was in arrear, and that the fact of *Lloyd* handing over his receipt to the Plaintiff, is a strong proof that *Lloyd* abandoned his claim on the lessor, and had no further call on him. As to the other issue, the payment may, in fact, be taken as having been made by the Plaintiff, though it is *Lloyd* who takes the receipt, and hands it over to the Plaintiff. I therefore think they are, for this purpose, to be considered as one, and that the payment must be taken as made by the Plaintiff. The rule therefore must be

Discharged.

June 29.

WILLISON v. WHITAKER.

Bail discharged by the Plaintiff taking from the Defendant bills of exchange, to which a surety is party, for payment by instalments.

THE Plaintiff having recovered a judgement for 97*l.*, which, upon error brought for delay, had been affirmed, consented to receive from the Defendant three bills of exchange, accepted by the Defendant's father, at four, eight, and twelve months' date, for the amount of the debt and costs in three instalments. The bills proving of no value, the Plaintiff had commenced actions against the bail, on whose behalf *Vaughan*, Serjt., had, on a former day, obtained a rule *nisi* to stay proceedings in those actions, and to enter an *exoneretur* on the bail piece.

Best, Serjt., now showed cause, contending that the bail were too late in this application, after the Plaintiff had incurred costs. The latest decision on this point, which was the case of *Brickwood v. Anniss* (a), was contradictory to the former cases, and ruled that the Plaintiff might give time to the Defendant without discharging the bail. The Defendant is constantly in the custody of his bail, and no bargain between other parties can prevent the bail from changing their custody for the custody of the sheriff, at any time that they please. There, too, the indulgence given, was communicated to the bail: here the bills were given without the privity of the bail.

Vaughan, in support of his rule. In *Brickwood v. Anniss*, all was in *feri*; the proposed composition with the creditors never took effect, nor was there any consideration for the Plaintiff's

(a) *Ante*, V. 614.

forbearance.

forbearance. Here the agreement is executed, and a consideration is given, the responsibility of an additional party.

GIBBS, C. J. The facts of the case of *Brickwood v. Anniss* are very shortly stated in the report, and the judgement is founded on a conversation between the Defendant and one of the bail named *Annis*, which also is very shortly stated, but I am confident in my recollection, that the fact warranted the doctrine there laid down; take the doctrine as the Court themselves put it: they say that the Plaintiff had in that case never disarmed himself: and that if he had never disarmed himself, the bail had not; but here it appears that the Defendant has procured a surety to accept bills payable at a future day, and those bills being payable at a future day, the Defendant has purchased the privilege of being free from arrest, until it be seen whether the bills will be paid or not: he has given therefore a consideration for his freedom from arrest for a certain time, and until that is expired, the Plaintiff could not take him; and that being so, according to the doctrine of all the cases, even of that which is cited, the bail are discharged; for the Court there merely say, the Plaintiff, by remitting his legal diligence (*i. e.* they do not say by precluding himself from proceeding), does not prevent himself from pursuing the bail. Lest any doubt should exist on their meaning, they proceed to say, the Plaintiff has never disarmed himself. There was no consideration there; here a consideration has been given for the freedom from arrest. I am of opinion that the facts in that case did warrant the judgement there given, but whether they did or not, such was the doctrine of the Court.

Rule absolute to stay the proceedings in this action against the bail, on payment of the costs of the motion and costs of the action.

JONES v. LEWIS.

June 29.

VAUGHAN, Serjt., having obtained a rule *nisi* for discharging the Defendant out of custody, upon the ground that she was a married woman,

Copley, Serjt., showed cause upon two grounds; first, that the

If a feme covert issue a bill of exchange, she may be arrested as a feme sole.

A feme covert applying to be discharged from arrest, must apply on her own personal oath of the fact of cover-

ture, and not upon the affidavit of another.

arrest

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arrest was upon a bill of exchange, which the Defendant had drawn, and which had come into the Plaintiff's hands in the course of trade; and that after the bill was dishonoured, upon further application for payment, she had promised to pay as soon as she could; and that the very act of her issuing of a bill of exchange was evidence that she held herself out as a single woman (*a*). Secondly, that the affidavit of her coverture was not now made by herself, but by another.

Vaughan endeavoured to support his rule.

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GIBBS, C. J. Under the circumstances of this case, the Defendant cannot be relieved; she draws a bill of exchange, and does not swear she is a married woman.

Rule discharged.

(*a*) *Prichard v. Cowlam*, 2 *Marsh.* 40.

June 29.

JONES v. ATHERTON.

Though a sheriff make a warrant and seizure of goods under a *feri facias* last delivered to him, yet the Plaintiff in a *feri facias* first delivered to the sheriff is entitled to be first satisfied out of the fruits of that seizure.

If a second *feri facias* be delivered to a sheriff after he has the Defendant's goods in possession under the prior *feri facias* of another, the goods are bound by the second execution, subject to the first execution, from the date of the delivery of the last writ to the sheriff;

THE Plaintiff sued out a writ of *feri facias*, returnable on the 9th of *February*, and on that day delivered it to the sheriff, who on the 10th made a warrant to his officer to seize the Defendant's goods. *Colman* and *Morris* had likewise obtained a judgement against the Defendant, and had sued out a prior writ of *feri facias* thereon, under which the same sheriff had previously issued his warrant, and entered and seized the Defendant's goods, and continued in possession of them until and after the 12th, on which day this prior execution was withdrawn, by an order of court, but no new warrant was made by the sheriff to seize under the Plaintiff's execution. Under these circumstances, *Best*, Serjt., had on a former day obtained a rule *nisi* to set aside the Plaintiff's execution, upon the ground that this writ had not been executed until the 10th, the day after it was returnable.

Shepherd, Solicitor-General, and *Copley*, Serjt., showed cause against this rule. They insisted that the goods were bound from the time of the delivery of the Plaintiff's writ to the sheriff; and that if the writ be delivered to the sheriff upon the return-day, it suffices. The sheriff being then already in pos-

And that without warrant on the second writ, or further seizure.

session

session of these goods under *Colman's* execution; it was impossible for him to make any further seizure, or acquire any more complete possession of them, than he then had; it therefore was unnecessary that he should make any warrant at all to the bailiff: if, however, any warrant were necessary, then the warrant made on the 10th was available to authorize the officer's continuance in possession upon and after the 12th, when the prior execution was withdrawn.

Best, in support of his rule, contended, that until the first execution was got rid of, and while the goods were already in the custody of the law, no seizure could be made under the second execution; the second execution was therefore wholly inoperative so long as the first execution continued in force, and consequently, when the first execution was withdrawn, the sheriff ought to have made his warrant, and have seized the goods under the second execution; but in this case no seizure under the second execution ever was made. In *Bachurst v. Clinkhard*(a), *Holt*, C. J., held, that even where the joint goods of *Dyke* and *Brown* had been once seized, and were in the custody of the law under an execution of *J. S.* against *Brown*, although only the partnership share of *Brown* could be sold under that execution, yet that the partnership share of *Dyke* in the goods could not be seized under the Plaintiff's, *Backhurst's*, subsequent execution against *Dyke*, by the same or any other sheriff; and that if they were sold thereon, such bargain would be void. The delivery of the second writ to the sheriff would, in this case, if the writ had continued in force after the first execution was withdrawn, have bound the goods, and taken priority according to the date of its delivery to the sheriff, but, as the case was, this writ could not be executed at all, for the writ ran out before the first execution was disposed of: the sheriff never affected to take a legal possession for the behoof of the Plaintiff until the 10th, when he made his warrant, at which time the writ was inoperative; and during all the time that the Plaintiff's writ was in force, the sheriff made no seizure for the Plaintiff, nor ever was in legal possession of the goods for him, but only for *Colman*.

GIBBS, C. J. I cannot distinguish this case in principle from that of *Hutchinson v. Johnstone* (b). There, indeed, the warrant upon the first writ issued subsequently to the warrant upon the second writ. The sheriff informed the Plaintiff in the second

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(a) *Sho. B. R.* 173.(b) 7 *Term Rep.* 729.

execution,

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execution, that the Plaintiff in the first execution must be first satisfied; the second Plaintiff paid the sheriff the sum to be levied under that first execution, and applied to the Court to have that money restored to him, upon the ground that the first Plaintiff's warrant was not made till after his own. The sheriff says, "True, I did not make my warrant on the first execution, till after my warrant on the second writ; but as I had the first writ first delivered to me, it must take precedence;" and the Court held that he was right. This shows, that if the sheriff has the writ in his office, though no warrant be made on it, if he afterwards get possession of the goods, though apparently under another writ, yet his possession shall enure to the use of the first writ, and that the goods are bound by the writ in the sheriff's hands, from the time of its delivery to him.

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BURROUGH, J. There is no question about it: the goods were bound from the delivery of the writ to the sheriff. Suppose there had been a sale under the first writ, and a surplus, would not the surplus be bound by the second writ in the sheriff's hands, and applicable to satisfy that execution?

Rule discharged, but without costs.

June 29.

NOBLE v. ADAMS.

The obtaining goods upon false pretences, under colour of purchasing them, does not change the property.

Where goods are delivered to a vendee at a wharf, who afterwards ships them there, no subsequent stoppage of the goods *in transitu* can take place.

Where a bankrupt sued for the benefit of his assignees,

the Court refused to grant a new trial, unless his assignees would abide by the verdict and become responsible for the costs.

THIS was an action of trover, for certain *Madras* handkerchiefs. The Plaintiff contended that he had purchased them from *Cross and Co.* The Defendant was a wharfinger in *London*, into whose hands the goods had come by the Plaintiff's order, upon their arrival in *London* from *Glasgow*. The Defendant sought to retain the goods for the benefit of *Cross and Co.*, by whom he was indemnified; and upon the trial of the cause at *Guildhall*, at the sittings after *Easter* term, 1816, the Defendant insisted upon two grounds of defence; first, that the vendors had a right to stop the goods *in transitu*, which they had exercised by forbidding the Defendant to deliver them; next, that the property in the goods never had been changed, the goods having been obtained under such circumstances of fraud as vitiated the sale. It appeared in evidence, that the Plaintiff,

a trader

a trader in *London*, being the holder of a bill for 447*l.* 13*s.* accepted by *Outhwaite* and Co., with whom he was in the habit of exchanging bills, and whom he knew to have become insolvent, and knowing himself also to be in embarrassed circumstances, wrote to *Malcolm*, a creditor in *Glasgow*, stating that *Outhwaite* and Co. could not pay their bills, and were not worth a farthing, and that it was necessary for him, the Plaintiff, to go down into *Scotland*, and purchase goods, by which means he could stand, and would help out one or two of his creditors. He went to *Glasgow*, and there purchased the goods in question of *Cross* and Co., for which he paid by *Outhwaite's* acceptance, and by another bill for 108*l.* 13*s.* 10*d.* which *Malcolm* was prevailed on to draw on the Plaintiff, in favour of *Cross* and Co., payable at *Prescott's* and Co., in *London*. He did not, however, assist either of his creditors. It did not appear in evidence who was the person that delivered the goods at the wharf at *Leith*, but it clearly appeared that they were shipped for *London* by the Plaintiff himself, to whom the Defendant's employers, the *Edinburgh* and *Leith* shipping company, gave an acknowledgment, dated 21st *April*, 1815, that they had received the goods from the Plaintiff, to be shipped at *Leith* in the *Hope*, deliverable at the *Glasgow* wharf, *London*. *Gibbs*, C. J., was of opinion, that it appeared, that there had been an absolute delivery to the Plaintiff, and that the right of stoppage *in transitu* was at an end, but reserved the point. Upon the other defence, he thought it was a question for the jury, whether *Cross* and Co. had merely made an improvident sale, or whether the Defendant had proved that the Plaintiff had fraudulently obtained the goods. If the jury thought that the Plaintiff went down to *Scotland*, having formed a deliberate plan to put off bad bills for valuable merchandizes, knowing the goods would never be paid for, and intending then to abscond with the goods, or to throw them into an immediate bankruptcy, or to pass them over to a particularly favoured creditor, his lordship was of opinion that the Plaintiff had been guilty of a fraud, and that the sale would not change the property; but if the Plaintiff only meant to give these bills, and himself, by these bills, more credit than they deserved, but intended to continue to carry on his business, and to try to pay for the goods at some time or other, if he could, that was not such a fraud as would vitiate the sale. The jury found that this was a fraudulent transaction, undertaken knowingly, and

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with

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with intent to defraud *Cross* and Co. of their goods, and gave their verdict for the Defendant.

Best, Serjt., in this term, obtained a rule *nisi* to set aside this verdict, and have a new trial upon payment of costs.

Shepherd, Solicitor-General, and *Vaughan*, Serjt., showed cause against this rule. Whatever might have been the case, if goods obtained by false pretences had been afterwards sold to another, for valuable consideration, as in the case of *Parker v. Patrick* (a), yet, in favour of the person so fraudulently obtaining them, the property is not thereby changed. *Ex dolo malo non oritur contractus*; one who had professed and practised a fraud, was now attempting to reap the fruit of it by this action.

The Court did not think it necessary to hear the counsel in support of the rule. Without defining what may or not amount to a fraud, which will render a sale of goods void, we think, on looking into this case, that the evidence does not exhibit any misconduct on the part of the Plaintiff sufficient to show that the sale was void. It was proved that the Plaintiff knew that *Outhwaite's* bill was bad; it was proved that his own credit in this country was gone; it was proved that he went down to *Scotland* intending to get these goods for a bad bill; but there is no proof of what passed between *Cross* and the Plaintiff, or by what practices the latter obtained the goods, without which it cannot be known whether or not the means which the Plaintiff used were such as to fix him with the offence of obtaining them by false pretences: that offence would vacate this transaction, which, on the outside of it, was a sale; for this reason, and for this reason only, that there is no evidence that the Plaintiff was guilty of the offence of obtaining the goods under false pretences, though there is abundant matter of suspicion of fraud, we think that there ought to be a new trial. But it is fit to impose the terms that the assignees of the Plaintiff, who is now a bankrupt, shall consent to be bound by the event of this action, and to be responsible for the costs.

The Court, upon communication between themselves, declared their opinion, that under the guards with which *Gibbs*, C. J., had stated the proposition to the jury, his lordship had stated it correctly.

The assignees of the Plaintiff now signified their refusal to accept the permission offered them.

(a) 5 Term Rep. 175.

Per Curiam. The Plaintiff is a bankrupt; he will be unable to pay any costs himself. The Defendant has obtained a verdict. The Plaintiff, or rather his assignees through him, apply for a new trial. They profess, that if the Plaintiff gets a verdict against the Defendant, they will take the benefit of it; if *Noble* fails, they refuse to be bound by the verdict, or pay the costs, upon the ground that this is *res inter alios acta*. Upon that ground, that it is *res inter alios acta*, we leave them to that right of action which remains to them, and this rule must be

Discharged.

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June 29.

THIS was an action for false imprisonment: the Defendant pleaded the general issue. Upon the trial of the cause, before *Bayley, J.*, at the *Surry Lent* assizes, 1816, it appeared that the Defendant was a magistrate; and the Plaintiff proved that a notice of this action had been served on him in due time, signed at the bottom with the name of the Plaintiff's attorney, "*David Shuter*," and his place of abode, in words at length, but on the back it was indorsed "*D. Shuter*," with his abode at length. It was objected that this indorsement, being abbreviated, was not a sufficient compliance with the statute 24 G. 2. c. 44. s. 1., which requires that on the back of such notice shall be indorsed the name of such attorney or agent, together with the place of his abode. It was proved that the Plaintiff, who was a constable, having been engaged till evening in executing a warrant signed by the Defendant, inquired of him, whether any thing was allowed for his service, and on being answered in the negative, said to the Defendant, "If you have any more warrants to serve, do not send them to me, for I will not serve them:" the Defendant mildly replied, "What is that you say, *Mayhew*?" The Plaintiff repeated, "If you have any more warrants to serve, do not send them to me, for I will not serve them, you may serve them yourself." The Defendant immediately gave a verbal order that the Plaintiff should be taken away to the cage, in the town of *Farnham*, which was done, and he was confined until the next morning, when he was discharged. For the Defendant, it was contended, that he was warranted, as a magistrate, in committing the Plaintiff to prison for

Under the statute 24 G. 2. c. 24. s. 1. a notice of action given to a magistrate is sufficiently indorsed with the name of the attorney, if he indorse it with the initial letter of his Christian name, and with his surname and place of abode in words at length.

A justice of the peace committing for a contempt of himself in his office, cannot commit for punishment, unless by warrant in writing.

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v.
LOCKE. for a contempt, of which he had been guilty in using the disrespectful language above stated. *Bayley, J.*, reserved both points, subject whereto, the jury found a verdict for the Plaintiff, with 5*l.* damages.

Best, Serjt., in *Easter* term last had obtained a rule *nisi* to set aside the verdict, and enter a nonsuit. Upon the first point he referred to a nameless case on the home circuit, in which he was instructed that Lord *Ellenborough, C. J.*, had holden, that a notice to an excise officer signed by "*J. King*," the Plaintiff's attorney, was insufficient. Upon the second point, namely, whether a magistrate could commit for a contempt, he referred to *Rex v. Revell (a)*, and *Pettit v. Addington (b)*.

Onslow and Copley, Serjts., on a former day in this term showed cause. As to the indorsement, it is the common practice to use this abbreviation of the Christian name of the attorney. It gives sufficient information of his name and place of abode, to enable the Defendant to find him and tender amends, which satisfies all the purposes of the act. This notice could not have misled the Defendant; and according to the case of *Taylor v. Fenwick (c)* it appears not to be necessary that the name should be indorsed on the notice; it suffices if it be subscribed, as here it is at length, at the foot of the notice. In *Wood v. Folliott (d)*, Lord *Loughborough, C. J.*, held the description sufficient, because, he says, "a letter would have found them; so would a porter:" and the notice was signed *Down* and *Cox, Furnival's Inn*, attorney for the said *W. W., A. W., and O. D.* The statute 2 *G. 2. c. 23. s. 22.* requires that "every writ and process for arresting the body shall be subscribed or indorsed with the name of the attorney, &c. written in a common legible hand;" yet the greater part of writs are subscribed with the initial letters only of the attorney's Christian name: nevertheless, there is no instance of any motion for setting aside the execution of process upon that ground; and this practice has prevailed upon the same principle which applies to the present case, that the purpose of the act has been satisfied. As to the merits, they argued, that the Plaintiff's language was not such a contempt for which a magistrate might commit. Whatever intentions he might profess, the occasion of his refusing to execute a warrant never presented itself: there was *locus penitentie*. In *Revell's* case, though much stronger than this, and though the

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(a) 1 *Str.* 421.

(b) *Peake, N. P.* 62.

(c) 7 *Term Rep.* 635.

(d) 3 *Bos. & Pull.* 552. *n.*

contempt

contempt was most gross, it is not decided that the magistrate might commit: that is merely the *dictum* of *Wearg*, the counsel. The inference to be drawn from that case is, that there cannot be a commitment for a contempt which is not also indictable. For the profession of intended disobedience, without the act being executed, no indictment would lie. In *Pettit v. Addington*, though Lord *Kenyon*, C. J., had his doubts, the verdict passed for the Plaintiff, and never was disturbed. This commitment was bad, first, because it was made without a warrant; next, because a commitment for a contempt is a commitment by way of punishment, and a magistrate cannot commit by way of punishment, unless to the common county gaol (a). This is also recognized by the statute 6 G. 1. c. 19. s. 2. which recites that vagrants and other criminals, offenders, and persons charged with small offences, are “for such offences, or for want of sureties, to be committed to the county gaol, it being adjudged that by law the justices of the peace cannot commit them to any other prison for safe custody,” and enacts that they may commit such vagrants either to the common gaol or house of correction. In *Broughton v. Mulsho* (b) the distinction is taken, that for the purpose of detaining a prisoner for examination, a justice of the peace may by word of mouth authorize any person to detain him; but no case decides that for the purpose of punishment the magistrate may commit a prisoner to any custody except the county gaol. In the case of *Sir G. Throgmorton v. Allen* (c), it is held that the Chief Justice of the King’s Bench may, by word of mouth, authorize the marshal to arrest and safely keep a prisoner, and to have him before the Chief Justice *quandocunque*, &c. to answer those things which on the king’s behalf shall be objected against him; but this is not a model for inferior jurisdictions. And although a justice of the peace may by parol authorize the arrest of a person for a breach of the peace committed in the magistrate’s presence, yet he can only detain him in custody until a warrant can be made out. There is also a distinction between a commitment by a court of record, for a contempt therein, and a commitment by a single magistrate. In *Bushel’s case* (d), the order of the sessions for the commitment is drawn up in form. If the Plaintiff had in this case sued out a writ of *habeas corpus*, no return could have

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(a) Stat. 5 Hen. 4. c. 10. Lord *Sanchar’s case*, 9 Co. 119. b. *ad calcem*. 1 Hale P. C. 585.

(b) *Mo.* 408. cit. 1 Hale P. C. 585.

(c) 2 Bro. Ab. 558. *Trespass*, C. pl. 2.

(d) *Vau.* 136.

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been made to it, but in the very words of the Defendant, which would be insufficient to warrant his detentiom (a). If a written warrant had been expressed in these terms, it would have been bad. It expresses no term for the imprisonment. Every imprisonment ought to be for a time certain, or until a fine be paid, or until the prisoner be thence delivered in due course of law. Thus, a commitment by commissioners of bankrupt until the prisoner shall conform to their authority, is bad. But it is not every court which has power to commit for a contempt. A court of requests has no power to commit. So, in *Spilsbury v. Micklethwaite* (b), it was held, that in the county court the sheriff could not commit for a contempt, but that he should have taken the offender before a magistrate, and could only have detained him until he had procured a warrant. So should the Defendant have done in this case. Whatever may be the general power of a magistrate to commit for a contempt, it has been illegally exercised in respect of the place and manner of commitment, and measure of punishment.

Best, in support of his rule. It is clear by the case of *Taylor v. Fenwick*, that this notice is not good. That case was, "Given under my hand at *Durham*," and it was held not to be an averment that the attorney lived at *Durham*; and the Court said, "the statute has prescribed a form which must be implicitly followed, and it admits of no equivalent. The statute was made to introduce strictness of form in favour of justices, and it must be observed literally. The statute requires that the name of the attorney should be indorsed. It directs where to look for the attorney's name, and it is not there. In the case of *Wood v. Folliott*, the statute (c) required the name and place of abode of the attorney or agent, and the attorney's name was signed, *Donn and Cox*; that is the common and only mode in which attorneys who are in partnership sign their names, but an individual signs differently, the Plaintiff's attorney is not in any partnership. If the case of *The King v. Revell* decides that indictment and commitment are convertible, yet any words, or gestures of incivility to a court are also indictable, as well as cause of commitment. It does not follow from *Spilsbury v. Micklethwaite*, that because the sheriff has no authority to commit, and must take an offender before a magistrate, therefore a magistrate, who has the power of commitment, must do the

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(a) 2 Inst. 591. 1 Hale P. C. 577. 585.

(c) 23 G. 3. c. 70. s. 30.

(b) *Ante*, i. 146.

same. Next, there were in this case words sufficiently contemptuous to warrant the magistrate in committing the Plaintiff, for support of the dignity of his office. It is said, the warrant must be in writing. Suppose a magistrate to be grossly insulted, and to have no means of instantly preparing a warrant, is the offender to go at large? In that case there probably would be a failure of justice. It is said the Plaintiff ought to have been sent to the county gaol, but that was impossible to be instantly done, for the county gaol is in the borough of *Southwark*, and this took place at *Farnham*, at the distance of many miles from it. The offender is sent to the cage there; if the Defendant had kept him there a week, the statute of 5 H. 4. would have applied, but although the Defendant did not intend further to examine him, yet, the transaction taking place late in the evening, the Defendant was authorized in keeping him there a reasonable and convenient time, until a warrant could be made out, and until the Plaintiff could, on the following morning, be sent forward to the county gaol. The next morning he is discharged. The preamble of the statute 5 Hen. 4. c. 10. recites that constables of castles be assigned to be justices of peace, and take people to whom they bear evil will, and imprison them within the said castles, until they make fine and ransom; that was a very different evil from the committing an offender to the cage until a warrant can be made, which, according to Lord *Hale*, the magistrate may do. *Bushel's* case is not law at present. For if a prisoner be committed for a contempt generally, that is a sufficient return to a writ of a *habeas corpus*, and he could not deliver himself. The Chief Justice of the King's Bench, acting as a magistrate, is subject to the same law as other magistrates, therefore *Throgmorton's* case is favourable to the Defendant.

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Cur. adv. vult.

GRUBS, C. J., now delivered the judgement of the Court.

With respect to the objection taken to the notice of action, it is this: The statute requires that the name of the attorney shall be indorsed thereon. This notice is indorsed *D. Shuter*, and it is said that his Christian name ought to be given at length. On hearing the argument, we strongly inclined to think, that the indorsement on the notice was sufficient; but we were urged by a case said to have been decided before Lord *Ellenborough*, that without the Christian name written at length, the notice was bad; we therefore thought fit not to decide the

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point without communicating with him. His lordship had no recollection of having positively decided that point, and, as it was admitted that that cause went off on another ground, and inasmuch as on the statute 2 *Geo. 2. c. 23.* the indorsement on a writ is as often made in the one way as in the other, we are satisfied that this objection is removed. As to the merits, without considering whether the words spoken were or were not a sufficient cause of commitment by the magistrate, we are of opinion that this commitment, which was clearly a commitment by way of punishment, and was made by word of mouth only, without warrant in writing, cannot be supported; for it is clearly laid down in 2 *Hawk. (a)*, and by Lord *Hale (b)*, that such a commitment by a magistrate must be made by a warrant in writing. We are of opinion therefore, that the rule for a non-suit must be

Discharged.

(a) Book 2. c. 16. s. 3.*(b)* 2 *Hale P. C.* 122.

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June 20.

CREW v. ATWOOD.

If process be returnable on the last return-day of any term, and the Plaintiff deliver a declaration, with notice to plead, on the return-day or the day following, and if the day next following the return be a *Sunday*, then on the second day after the return, the Defendant is not entitled to an imparlance.

Irregularities in practice are not excused from liability to costs on the ground that the party is misled by *Impley's Practice*.

BEST, Serjt., having obtained a rule *nisi* to set aside the interlocutory judgement in this case for irregularity,

LENS, Serjt., showed cause, maintaining that it was regular, under the following circumstances. The writ was returnable on the last return of *Easter* term; the declaration, laying the venue in *London*, with notice to plead, was, on *Saturday, 25th May*, being the day next after the return-day, delivered conditionally in *London*: the Defendant on the 30th entered an appearance, and the Plaintiff demanded a plea on the 31st, and signed judgement for want of a plea; the writ, he said, being returnable on the last return-day of a term, and the Defendant residing in *London*, and the declaration having been delivered on the day next after the return-day, the Defendant was bound to plead within four days of the delivery of the declaration, and was not entitled to any imparlance, according to the rule of court, *Hil. 35 G. 3.*, seen in 2 *H. Bl. (a)*.

BEST, in support of his rule, contended, that by the rule of

(a) 2 *H. Bl.* 551.

court

court in question, which he cited from *Peacock* (a), and which was also stated in *Impey's Practice*, the Defendant was not here deprived of his imparlance, because the Plaintiff had not delivered his declaration, accompanied with notice to plead, on the very return-day of the writ, that rule of court giving the Plaintiff the day after the last return day of a term to deliver his declaration, only in the single case where the return-day falls on a *Sunday*.

The Court held that the Defendant had been misled by the statement of the rule in *Impey* and *Peacock*, and that he would have done better to refer to so high an authority as *H. Bl. Reports*, and, [as they had done in another late instance, where *Impey's Practice* had misled the parties,] they

Discharged the rule with costs (b).

(a) *Peacock's Rules and Orders of the Court of Common Pleas*, p. 176.

(b) The only copy of the rule in possession of the secondaries, which is in MS., and bears only a copy of the judges' signature, does not agree *verbatim* with the rule given in *H. Bl.* though it is in substance the same. The rule, as given by *Peacock*, varies from both of the above in several particulars of less consequence, but principally in omitting the word "not" before "happen," in the 16th line, which has the effect, in every case to which this rule applies, of allowing the Plaintiff one day less to declare in. The words of the rule, as inserted in a book belonging to Mr. Secondary *Griffith*, are as follow :

REGULA GENERALIS.—*Hilary Term*, 35th *Geo.* 3.

It is ordered, That upon all process sued out of this court, returnable the last return of any term, if the Plaintiff declares in *London* or *Middlesex*, and the Defendant lives within twenty miles of *London*, the Defendant shall plead within four days after such declaration filed or delivered with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered on the day of such return, or on the day next after such return, in case the same shall not happen on a *Sunday*; in which case the Plaintiff shall have the whole of the day following to file or deliver such declaration as aforesaid. And in case the Plaintiff declares in any other county, or the Defendant lives above twenty miles from *London*, the Defendant shall plead within eight days after the declaration filed or delivered with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered as aforesaid. And it is further ordered, That the rules now in force respecting the times of declaring and pleading upon any process returnable the first, second, or third return of any term, shall also extend to the fourth return of *Easter Term*.

By THE COURT.

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July 1.

CLARKE v. DAVIES.

In avowry for rent under the statute 11 G. 2. c. 19, it is not necessary to aver that the rent continued in arrear at the time of the making avowry or consuance.

Upon demurrer, if each party takes objections to the pleadings of the other, it is the duty of each to deliver paper-books, with the points intended to be made on both sides, stated in the margin.

In replevin for taking the Plaintiff's goods in a dwelling-house, the Defendant made consuance of the taking as a distress for rent due upon a demise to the Plaintiff. Plea, that at the time of the demise and rent accrued, the Defendant was co-vert of J. C., then her husband : held that it must be intended that the husband continued living at the time of the distress taken, and that therefore the goods could not be the Plaintiff's, but her husband's, and so she had no ground of action.

In replevin, an avowry or consuance for rent admits the property of the goods to be in the Plaintiff.

But if the Plaintiff's plea subsequently shows the property of the goods to be in another, the Plaintiff cannot maintain the action.

IN replevin for taking the Plaintiff's goods on 12th May in a certain dwelling-house, the Defendant made consuance as bailiff of *M. Campbell*, and acknowledged the taking as a distress for eight weeks' rent, payable weekly for a dwelling-house, under a demise thereof from *M. Campbell* to the Plaintiff, and because 62l. 5s. 6d. rent on the 9th day of May, and from thence until, and at the same time when, &c. was in arrear, the Defendant acknowledged the taking. The Plaintiff pleaded in bar, first, that she did not hold as tenant to *M. Campbell*; secondly, that before and at the time of the making of the supposed demise, and at the time when the supposed arrear of rent became due, she the Plaintiff was married to *J. Clarke*, then her husband, and this she was ready to verify, wherefore she prayed judgement and her damages; thirdly, that nothing was in arrear. The Defendant joined issue on the first and last pleas, and demurred generally to the second plea. The Plaintiff joined in demurrer.

This case was first spoken to in *Easter* term 1816, when it appeared that the Defendant had delivered paper-books, in the margin of which were stated two points, which the Defendant meant to make on the argument, to invalidate the Plaintiff's second plea; and * the Plaintiff had delivered paper-books, in the margin of which was stated a point which the Plaintiff meant to make on the argument, as showing that the Defendant's consuance was bad; the Court were at first inclined to consider that the effect of the practice established in this respect, was, that the Plaintiff, by delivering paper-books which contained that point only, confined herself to that point, and abandoned the defence of the points made by the Defendant as untenable, and could not be permitted to argue them; but *Vaughan*, Serjt., for the Plaintiff, stating that the parties had supposed it sufficient, if each called the attention of the Court to those points which herself intended to make, and that it was for the opposite party to supply the points which she intended to make, the Court permitted the Plaintiff to speak to all the points.

Vaughan,

Vaughan, for the Plaintiff, contended that the conusance was bad, because it was intended to be a conusance under the statute; and therefore, although the Defendant might have pleaded otherwise if she had made conusance at common law, yet, inasmuch as the statute (a) expressly requires that the conusance shall show that the rent distrained for at the time of the distress was, and still remains, due; which last expression hath always been taken to refer to the time of the conusance made; and inasmuch as the conusance in this case only showed that the rent was in arrear before and at the time of the distress, without adding that it "still is in arrear," as all the precedents, he said, were, the conusance could not be supported.

But BURROUGH, J., observed, that the precedents ran in both forms, and that manuscript precedents of *Draper* and *Walker*, Serjts., omitted to state that the rent was in arrear at the time of the avowry; and the Court overruled that objection.

The cause was spoken to on a subsequent day in the same term, when the Court offered the Defendant permission to amend, either by pleading, or avowing any new or further pleas, or avowries; but the Defendant declined the indulgence.

In this term, *Pell*, Serjt., in support of the demurrer, contended that the second plea was ill (b). "A feme covert is of capacity to purchase of others without the consent of her husband; but her husband may disagree thereunto, and divest the whole estate; but if he neither agree nor disagree, the purchase is good." So (c), "If the wife agree to an estate made to her during coverture, she shall be liable to all charges to which the estate is subject: as, if the estate was granted by fine, with the render of a rent, she shall be chargeable with the rent." "So, to the covenant of a lease." The plea artfully states that the Plaintiff, at the time of the demise made, and rent accrued, was covert of *Joseph Clarke*, then her husband, saying nothing of the time of the distress. At those times, although covert, she was liable, on the authorities cited. If at the time of the distress the husband continued alive, the Plaintiff had no property in the goods, for they were his, and therefore she cannot sue for the taking them; if he was then dead, she remains liable to the arrear of the rent. No case is to be found, in which coverture pending a demise to which the husband has neither assented nor dissented, has been pleaded in bar. The Plaintiff has not

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(a) 11 Geo. 3. c. 19. s. 22.

(b) *Co. Lit.* 3. a.(c) 2 *Co. Dig.* 101. *Baron and Feme*, S. 2. cites 1 *Ro.* 349. *l.* 17.

stated

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stated enough on this record to enable her to recover, for she shows that she has been covert, but does not show that her husband is dead, in which latter case only can she have property in the goods. On the *pleadings it must be taken, that he is still living. It was not incumbent on the Defendant to reply that he continued living; that would be a departure. Where a person is once shown in pleading to be alive, it must be taken that his life continues, unless the contrary be averred (a). This principle is supported by sound reason: it lies more immediately within the knowledge of the wife, than of any other person, to say whether the husband be dead or divorced; if, therefore, it be necessary for her defence to show that the husband is dead, it is for her to aver his death. It will be contended that by making conusance, the Defendant admits the property of the goods to be in the Plaintiff, as stated on the record; but if she by her plea shows that the property is not in her, then either she disqualifies herself to sue for those goods, or she commits a departure from her declaration. She declares for the taking of her goods, the Defendant acknowledges the taking to be rightful, because the Plaintiff owed rent; the Plaintiff pleads that the Defendant had no right to take them, because the goods were her husband's. No case in replevin is found where, to an avowry for rent, coverture has been pleaded. A married woman is clearly competent to take an estate, and her husband's consent is not requisite thereto; the estate is in her, until his dissent divests it. If she acquires an estate in land, out of which rent is reserved, inasmuch as, under the original feodal grant, at the common law, if the services under which the grant was made were left unperformed, the grantor might resume the land, and the coverture of a feme grantee would have been no bar to the resumption; so, after the pledge of distress, which was borrowed from the civil law, was substituted for the resumption of the land, the coverture of the grantee could in like manner be no bar to the taking that pledge of a distress, and holding it until the services were performed. The only evidence that the Plaintiff is sole, is, that she sues on the record as if sole; but the evidence of her coverture is, that she positively avers on the record that she was covert on the 9th of May, whence it is to be presumed that she continued covert on the 12th.

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Vaughan, Serjt., contra. The Defendant, by avowing, admits

(a) *Wilson v. Hodges*, 2 East, 512.

the

the property to be well pleaded in the party on whom the distress is taken, and therefore the property cannot on this record be taken to be the husband's (a); the Defendant is estopped from now contending that the goods belong to the husband. If he wished to contest the Plaintiff's property in the goods, he should have pleaded *non cepit* [to which BURROUGH, J., agreed], or property in another. In order to show that the estate vested in the husband, the Plaintiff ought to have replied the husband's assent to the contract of the wife, which he has not done. Upon a plea of assignment of a term to *Catherine Kingston*, where the Plaintiff replied her coverture, the Court held that unless the plea had gone on to show the husband's dissent, the estate vested in the wife (b). "In bar (c) to an avowry for rent, the Plaintiff may plead as in bar to debt for rent." In debt for rent, the Plaintiff might have pleaded her coverture, or given it in evidence on *nil debet*. The passage cited from *Comyn* (d) to show that the estate vests in the wife during coverture, is misapplied, being ranged under the head, "What acts of the husband the wife may, after his death, affirm by her agreement," and is only intended of the wife being sued after the decease of the husband. But she cannot during coverture contract any obligation by which she can bind herself to pay rent during her coverture. "If the cattle of a feme sole be taken, and she afterwards intermarry, the husband alone may have replevin: but if they join, after verdict, judgement will not be arrested, because the Court will presume them jointly interested (as they may be, if a distress be taken of goods, of which a man and woman were joint-tenants, and afterwards intermarried), the avowry admitting the property to be in the manner it is laid (e)." The words "then her husband," narrow the allegation of his life to that particular time.

Pell, in reply. "If a lease for years be made to baron and feme, rendering rent, after the baron's death, if the feme agree to the lease, debt lies against her for all the arrearages incurred in the life of the baron (f)." The case therefore stands thus. On 12th May a distress is taken for rent due on the 9th May;

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(a) *Bull. N. P.* 53. cites *Arundel v. Trevil*, *Sid.* 82. *

(b) *Barnfather v. Jordan*, 2 *Doug.* 452.

(c) *Co. Dig. Pleader*, 3 K. 20.

(d) 2 *Co. Dig.* 101. *Baron and Feme*, S. 2. ante, p. 74.

(e) *Bull. N. P.* 53. *Bourne & Ux. v. Mattaire*, P. 8 G. 2. *Cas. temp. Hardwicke*, 119.

(f) 1 *Ro. Ab.* 349. *Baron and Feme*, Z. pl. 2. line 19.

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the Plaintiff denies the Defendant's right to distrain on the 12th, because she says she had a husband living on the 9th, but though she says not whether he continued alive from the 9th to the 12th, she admits that on the 12th she still held of the same lessor : either therefore she was still covert on the 12th, which must be presumed, as she has not shown her husband's death ; or, if he is dead, her holding on until the 12th, is an agreement after his decease to the demise made to her in his life-time ; and, either way, she is liable to the rent and to the distress.

Cur. adv. vult.

GIBBS, C. J., now delivered the judgement of the Court.

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We have considered this case, and we are of opinion, on the fullest consideration, that the plea in bar is bad. The Plaintiff, *Mary Anne Clarke*, declares for taking her goods and chattels. The conusance is, that the Plaintiff held the premises up to a certain day, when the rent became due, and from thence until and at the said time when, &c., as tenant thereof to *M. Campbell*, and because certain rent, which became due on a certain day, was in arrear, therefore the Defendant distrained the goods. She pleads, first, *non tenet*. 2dly, That before and at the time of the demise, and also at the time when the rent became due, she was covert of a husband ; and the inference which she wishes to arise is, that because she was then covert, the demise was not made to her, but to her husband ; or, if to her, that the holding was by her husband, or by her and her husband, and destroys the right to distrain on her. We think that is not so. We think, that if the presumption arises that the coverture, alleged to have existed on the 9th of *May*, did continue until and on the 12th, and if, as it has been argued, that be the necessary consequence, then the plea in bar is clearly bad on this ground, because it states a fact, pleaded by the Plaintiff herself, inconsistent with her action ; for if at the time of suing she has a husband living, she clearly cannot maintain her action. But, be that as it may, and supposing that presumption not to be raised, and that the effect of the allegation only is, that the Plaintiff had a husband when the rent became due ; yet still she cannot succeed : for supposing the demise to have been made to her during coverture, the Plaintiff would have held (*sub modo*, it is true) up to the time when the rent became due. We think, therefore, that notwithstanding all the material facts stated in the plea in bar, the conusance remains untouched.

This

This can in no case be of any disadvantage to the Plaintiff; for on the plea of *non tenuit* she may take advantage of all the same facts, of which she might have taken advantage on this countenance.

Judgement for the Defendant.

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BEST, Serjt., moved to amend a fine by inserting before the words "in the county of the town of *Kingston-upon-Hull*," the words "in the lordship of *Myton*," upon an affidavit that the premises intended to pass were in the lordship of *Myton*, in the county of the town of *Kingston-upon-Hull*, that they were intended to pass, and that they were described in the terms of the amendment now prayed for, in deeds of lease and release, intended to lead the uses of this fine, and in pursuance of which, it was sworn, this fine was levied; those deeds were since lost, but the draft had been preserved, and was now produced: and the premises lying in *Yorkshire*, a register county, the deed had been memorialized, and a copy of the memorial, certified by the proper officer, was now produced, upon the authority of which certified copy of the memorial, the Court permitted the amendment.

Fine amended by a lost deed to lead the uses, upon inspection of the draft, and of a certified copy of the memorial of the deed [the land being in a register-county], and on affidavit that the deed contained the amendment, and of the intent.

DOE, on the Demise of BUNNY, v. ROUT.

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THIS case was argued on a former day in this term by Pell, Serjt., for the Plaintiff, and Lens, Serjt., for the Defendant.

* GIBBS, C. J., now delivered judgement.

This was an action of ejectment brought to recover a certain messuage in *Andover*. It was tried at the *Winchester* spring assizes, 1816, before *Graham*, B., when a verdict was found for the Plaintiff on the demise of *Bunny*, subject to a point reserved upon the construction of the following will of *Mary Rout*,

for her own proper use and disposal:" Held not to carry land, being controlled by indications which rendered the testatrix's intent uncertain.

But if the testatrix's intent to pass land had clearly appeared, these words are sufficient to carry land.

Bequest of "all my stock in trade, household goods, wearing apparel, ready money, securities for money, and every other thing my property, of what nature or kind soever, to and

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spinster:—"I desire my just debts of every sort, with my funeral expenses, to be paid and properly discharged by my executrix hereinafter named; and, subject thereto, I give and bequeath unto my sister *Ann Rout*, all my stock in trade, household goods, wearing apparel, ready monies, securities for money, and every other thing, my property, of what nature or kind soever, to and for her own proper use and disposal. And I do hereby appoint her my whole and sole executrix of this my last will and testament." The will is executed so as to pass both real and personal estate, and both will pass by the language which is used, if the Court can collect a clear intent to convey both, but if only doubts are raised, they will not disinherit the heir. *Mansfield*, C. J., in the case of *Roe on the demise of Helling v. Yeud* (a), lays down the law clearly upon this subject. The question therefore is, whether the Court can collect a clear design to pass real as well as personal estate. There is no case decided on similar words, to guide us; therefore we must form our own judgement of the meaning of the words. The Plaintiff relies on some decided cases, and also contends, that, even without authority, the words of the will itself conduct us to the conclusion that the land passes by this devise. *Hopewell v. Ackland* (b) is the first case in point of time; the will runs thus:—"Whereas I have given my bond to leave my manor of *Buckley* to the daughter of my brother *James Ackland*, and the heirs of her body, if she live to attain the age of twenty-one years, but if she die before she attain that age, then it is to return to me again, if, therefore, my said brother's daughter shall happen to die before she attain her age of twenty-one years, I give the said manor to my brother *Richard Ackland* and his heirs; also I give to my brother *Richard Ackland*, all my land, tenements, and hereditaments whatsoever; also I give to my brother *Richard Ackland* all my goods, chattels, monies, debts, and whatsoever else I have in the world, not before by me disposed of." It was held that those words, "whatsoever else I have in the world, not before by me disposed of," carried land, notwithstanding that they were preceded by the words goods, chattels, monies, and debts. And it was rightly so decided; for the testator, in the earlier part of his will, disposes of land, but there is not a preceding word at all referring to personal property. He had, in the former part of his will, disposed of land; he had not disposed of any thing but land, it was therefore ne-

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(a) 2 New Rep. 214.

(b) 1 Com. 164.

cessarily

necessarily his intent to dispose of such land as was not before disposed of. That case is not applicable here, for not one precedent word in this will refers to land. *Huxtep v. Brooman* (a) was next cited: there the will was, "I give and bequeath to Mary, daughter of Mary Huxtep, and likewise to the son and daughter of Susan Topley, all the overplus of my money; and likewise beg of my executor, that he will pay into the hands of the above children's friends, all the money that is due to me on settling my father's account." So far the will relates to personal property only. He proceeds, "*Friday*." This form of recommending the subject shows that this was a substantive bequest, and stands independent of the other. Then follow the words, which the Lord Chancellor thought conveyed land, and he rightly so thought, "I give and bequeath to them all I am worth, except 20*l*. which I give to my executor, Mr. Thomas Brooman." The next case relied on was *Doe, lessee of Wall, v. Langlands* (b). There the will was, "To R. Doran and E. Wall I give and bequeath all and every the residue of my property, goods, and chattels:" and certainly that case is a full authority, that the words "all my property," uncontrolled, will carry real estate; and the Court of King's Bench thought that the words goods and chattels did not confine it to personalty; but the Court put it on this ground; they get rid of the difficulty, by reading the whole together with the copulative "and" inserted between "property" and "goods and chattels;" this renders the words goods and chattels cumulative, and so reading them, it is impossible to contend that they are restrictive. In this case, the position of the words renders it impossible to adopt the same solution of the difficulty; and *Doe v. Langlands* is therefore not precisely in point, since the same reasoning which is there used, cannot be applied in the present case. So the case stands on the part of the Plaintiff. The Defendant, on the other hand, contends that the meaning of these words, "every other thing, my property," must be confined to personal estate, and that they show no intent in the testator to give his real estate: and he cites *Tinewell v. Perkins* (c). That will ran in these words; *Item*, all those my freehold lands and hop-grounds, with the messuages or tenements, barns, &c., now in the tenure and occupation of the widow Leach, and all other the rest, residue, and remainder of my estate, consisting in ready money, plate, jewels, leases, judgements, mortgages, &c., or in any other thing whatso-

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(a) 1 Bro. Chan. Cas. 437.

(b) 14 East, 370.

(c) 2 Atk. 102.

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ever or wheresoever, I give unto my dearly beloved *Arabella Hitchins* and her assigns, for ever." And the question was, whether the residue passed to *Arabella* or not. There was no doubt but the words, to *Arabella* and her assigns for ever, would carry the fee to her, without the word heirs. *W. Fortescue, J.*, says, The words "whatsoever and wheresoever" must be confined to the things antecedent, and is restrained to his hop-grounds and leaseholds; for if he intended to give his wife all his real estate, why did he mention only the *Essex* estate? The reasoning of the Court is, that as these expressions are preceded by others, which enumerate personal estate only, they must be confined to matters of the same nature. This is much in point with the present case; for the preceding words are expressive of personal estate, and the general words follow immediately, and there is no realty mentioned in any preceding part of the will. The next case mentioned, is *Roe, on demise of Helling, v. Yeud (a)*. There the testator devises in the following words: "First, I will that all my debts and funeral charges be paid by my executrixes and executors hereinafter named." He then gives three several legacies to certain objects of his bounty, and to *Ann Parkin* an annuity of 20*l. per annum* during her natural life. It is observable that none of these bequests apply to any thing but personal estate. Then he goes on to say, "Item, I give to the five grandchildren of my late uncle, *Mark Fox's*, four daughters and one son," adding their names, ["all five of whom I constitute my executrixes and executors, and to whom I give all the remainder of my property whatever and wheresoever, to be divided equally between them, share and share alike, after their paying and discharging the beforementioned annuities, legacies, debts, and demands, or any I may hereafter make by codicil to this my will,] all my goods, stock, bills, bonds, book-debts, and securities in the *Witham* drainage in *Lincolnshire*, and funded property." And the will is attested by three witnesses. In that case *Mansfield, C. J.*, first states the principles on which the Court proceeds, and to which I alluded in my beginning, that there must be a clear intent to will away the property; otherwise the preferable title of the heir at law must prevail. It may be said, that the same force of reasoning which the late Chief Justice there uses cannot be here applied: there the enumeration made by the testator to explain what he meant by the remainder of his property, and which was restrictive of the meaning of the general expression, was made at

(a) 2 *New Rep.* 214.

the end of his will, whereas here, the words restricting the meaning, do not follow, but precede the general expression: but many of his reasons apply forcibly. First, there is no introductory clause in either will, showing an intent to dispose of the testator's whole property. Secondly, there is no provision throughout the will relating to real estate. Thirdly, in both wills all the provisions for payment of debts and legacies, are for payment by the executors and executrixes. Therefore, though the whole reasoning of that case does not apply here, a great part of it does; and, on the whole, we think, if the case were to be decided on the authorities now before us, they preponderate in favour of the Defendant. On the words of the devise itself, seeing that in all the introductory words used, the testatrix enumerates every particle of personal property which she can recollect, without saying any thing touching her land, and seems to add these words at last, merely lest she should have omitted something, we cannot think but that if she had had it in her intention to dispose of her land, she would have used more particular expressions: at all events, we cannot collect from the will a clear intent to dispose of her land. We therefore think that the title of the heir at law must prevail, and that the Defendant is entitled to judgement.

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Judgement for Defendant.

NANFAN and Wife v. LEGH.

THIS was a case directed by the Court of Chancery for the opinion of the Judges of this Court, the material parts of which in substance were, that *Peter Hulse*, grandfather of the Plaintiff, *Hannah Nanfan*, being seised in fee of an estate at *Millington*, in the county of *Chester*, where he resided, made his will, executed and attested to pass freehold estates, as follows: Touching all his temporal estate, he charged the whole thereof with payment of his debts, funeral expenses, and testamentary

Devise to testator's wife of his cottage for life, if she continued chaste and unmarried; but immediately after her death or marriage, to his son *Joseph Hulse*, as soon as he should attain twenty-

one, and to his heirs for ever. Devise of his land and estate in fee-simple, where he then lived (except what was thereinbefore bequeathed to his wife), to his son *Joseph Hulse*, as soon as he should attain twenty-one, and to his heirs lawfully begotten for ever, subject to an annuity of 7*l.* to his wife. Held that *Joseph Hulse* took an estate-tail in the land and estate in fee-simple where the testator lived.

Cases out of Chancery, sent to be argued in this Court, cannot be set down nor heard, unless they are signed by a serjeant.

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charges. He gave to his wife, *Hannah Hulse*, his cottage adjoining to his estate where he then lived, during her natural life, if she continued chaste and unmarried; but immediately after her death or marriage, to his son *Joseph Hulse*, as soon as he should attain to the age of twenty-one years, and to his heirs for ever. He gave his land and estate in fee simple, where he then lived, situate in *Millington*, except what was thereinbefore bequeathed to his wife, to his son *Joseph Hulse*, as soon as he should attain twenty-one years, and to his heirs lawfully begotten for ever, subject to an annuity of 7*l.*, to his wife, agreeable to articles made at the testator's marriage. He gave to his daughter *Hannah Hulse*, 600*l.*, to be paid to her out of his personal estate, as soon as she should attain twenty-one years, or to her issue, if any there were. He gave to his wife 30*l.* out of his personal estate, and certain furniture. He directed his executors to employ all the rents and profits arising from his whole estate for the support, education, and maintenance of his wife, son, and daughter, until she should attain twenty-one years, and then for the support of his wife and son, until he should attain twenty-one years, and then all the overplus of his goods, chattels, and effects, of what nature soever, he gave to his son, charged with payment to his daughter or her lawful issue, if any there were, of 100*l.* immediately after the son should become possessed of such residue, or in twelve months after he should attain twenty-one years. And if either of his children should die before the legacies thereinbefore bequeathed should become due, then his or her legacy, or share, so dying, should go to and for the use and benefit of his survivor, son, or daughter, as it should happen, if he or she so dying left no lawful issue; but if both his children should die before attaining twenty-one, and without issue, then he gave to his wife 200*l.*, with power to dispose of the same amongst her relations; and the other remainder of his whole estate he gave to his own relations, nephews and nieces, to be divided amongst them, share and share alike. The testator died in 1761: his son *Joseph Hulse*, his heir at law, survived him, and took possession of the estate devised to him, and died, leaving the Plaintiff, *Hannah Nanfan*, his only child and heir at law, him surviving, and having by his will, made after the death of *Peter Hulse*, devised to her all his real estate for her life, with remainders over. The Plaintiff, *Hannah Nanfan*, upon the death of her father, took possession of the estate at *Millington*, and upon the supposition that under the will of *Peter Hulse* she

was

was tenant in tail thereof, she, together with the Plaintiff, her husband, suffered a common recovery thereof, and afterwards contracted with the Defendant for the sale to him of the fee-simple of that estate at *Millington*; but the Defendant objected to the Plaintiff's title, on the ground that the estate was devised in fee-simple to *Joseph Hulse* by the will of *Peter Hulse*, and that *Joseph Hulse* had by his will devised the premises to his daughter the Plaintiff, *Hannah*, for her life only; that she could not therefore make a good title. The question was, Whether by the will of *Peter Hulse* an estate in fee or an estate, in tail, in the premises wherein he lived at the time of making his will, was given to *Joseph Hulse*, the father of the Plaintiff *Hannah*?

The parties concerned had omitted to obtain the signature of a serjeant to this special case, under the idea that, inasmuch as it was directed by the Court of Chancery, and settled by the Chancery counsel engaged in the cause, a serjeant's signature to it was unnecessary;

The Court and the officers agreed, that this opinion was wholly erroneous, and that a case out of Chancery, like any other case, unless it were signed by a serjeant, could not be set down for argument, and that the practice must in future be duly observed.

Lens, Serjt., for the Plaintiffs contended, that by the devise to *Joseph* and his heirs lawfully begotten for ever, *Joseph* took an estate tail only. The testator, having in other parts of his will devised a fee-simple in other terms, must be taken to have varied his phrase, not without a variation in his meaning, and though these might in some other cases be words of surplusage, they were not in this instance meant as such by the testator. He destines the residue of his whole estate, which includes the realty as well as the personalty, to go over to his nephews and nieces, ~~only in case his son and daughter should die without immediate descendants.~~ The proof is, that his nephews and nieces, to whom he gives the estate over, are themselves heirs lawfully begotten, in the larger and more general sense of the word; therefore he could not die without heirs lawfully begotten, so long as his nephew and neice survived; and consequently the estate, by the terms of the devise, could not go over to them until they and their heirs were extinct; and as they then would be incapable of taking, the devise could never take effect at all, and is therefore void, which is an argument against giving it this

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this construction, *ut res magis valeat quàm pereat*. The words lawfully begotten narrowed the description of heirs to those which were legitimately descended from the body of *Joseph*. There is in this respect a difference in construction between a deed and a will. *Littleton* says (a), "If a man give, *done* (which signifies by deed) lands or tenements to another, to hold to him and to his heirs males, or to his heirs females, he to whom such gift is made, hath a fee-simple." But Lord *Coke*, commenting thereon, says (b), "If a man by his last will devise lands or tenements to a man and to his heirs males, this, by construction of law, is an estate tail, the law supplying these words (of his body)." So, "Devise to one *et hæredibus legitime procreatis*, is tail (c)." In *Beresford's* case (d), a feoffment was made to the use of *Aden Beresford*, son of *James B.*, and of the heirs males of the said *Aden*, lawfully begotten, and for default of such issue, to the use of *Thomas Beresford*: and it was resolved that *Aden Beresford* took an estate tail. So (e), devise of a copyhold to his son or daughter, wherewith the testator's wife is then pregnant, & *hæredibus suis legitime procreatis*, and if they should die without fruit of their body, then that *J. S.* should sell it, creates an estate tail. Chief Baron *Comyn* (f) has overlooked this limitation over, and cites the case as an authority that a devise to *A.* and his heirs *legitime procreatis*, creates an entail. The only other case immediately in point is Lord *Ossulstone's* case (g). There were the words "for ever," as in the present instance: it was there held that the words, "his own right heirs male for ever," pointed to heirs issuing from himself, and did not give a fee, for that none could take, but heirs descended from the body of the testator. In another report of the same case (h), the judgement of the Court is not so fully, but is more pointedly expressed. The Court say, heirs male, in a will, are always intended of the body, and imply an estate-tail. This therefore meets the very case put by *Coke*, and there is the concurrent authority of Lord *Hale*, who, in the residue of the note cited above, adds the reasons. Lord *Ossulstone's* case supplies the words "for ever," if they were material, which they are not, for every entail in contemplation of law is a fee; and for ever.

(a) Co. Litt. 27. a. s. 31.

(b) Co. Litt. 27. a. Hil. 43 Eliz. C. B. rot. 1408.

(c) Co. Litt. 26. b. Harg. note 2. cites *Moor*, 711. *perperam pro* p. 611. (which is in point) or, [by Gibbs, C. J.] for 637. *Church v. Wyatt*.

(d) 7 Rep. 135., in some editions, 41. b.

(e) *Church v. Wyatt*, Mo. 637.

(g) 3 Salk. 336.

(f) Co. Dig. Devise, N. 5, p. 398.

(h) 11 Mod. 119. *Ford v. Ossulstone*.

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Bosanquet, Serjt., *contra*, urged that this devise created an estate in fee-simple: no decided case was directly applicable; the two cases cited were not entitled to the weight which had been given them, and the cause must be considered upon principle. These words in a feofment, or a grant, or a limitation to uses, would have given a fee; and there are no subsequent words which restrain it to an estate tail. Words such as are here found, would not, even in a will, carry an estate-tail. *Beresford's* case expressly distinguishes between *hæredum suorum*, and *de se*, the latter of which plainly denote the body; here it is the possessive, "his", not "of him". The limitations to uses, as was held in *Abraham v. Twigg* (a), are to be construed most nearly to wills, and gifts in tail are to be construed most nearly as devises, because the statute of *Westminster*, the 2d., says, *Voluntas donatoris, &c. de cetero observetur*. What, then, is the distinction between deeds and wills? In a will, the estate must be expressly given to the heirs special, however untechnically expressed. So is it in a deed; it suffices if it appear by any implication what the stock is, whence the heirs are to come: but it must not be a matter of probability or doubt; it must be the legitimate conclusion from the expressions used, not demonstrably certain, but morally certain, and as Lord *Kenyon*, C. J. says, in *Lane v. Lord Stanhope* (b), not conjecturing, but expounding. *Buller*, J., in *Hodgson v. Ambrose* (c), observes, that if a testator make use of legal phrases or technical words only, the Court are bound to understand them in the legal sense. It is bad logic to put a different meaning on words from that which in general they mean, without further aid than the words themselves (d). 'The intent of the devisor must plainly appear. It is laid down by the counsel for the Plaintiff, that the words "to a man and his heirs male" in a deed carry a fee, in a will create an estate tail': that is on the principle, that in a deed it is necessary absolutely to limit an estate-tail to heirs special. The Courts say, that the estate expressed is contrary to the rule of law: and therefore, as the feoffor has given an estate of inheritance in order to effectuate the deed, they reject the word "male." But in a will, the word male, which is part of the context following the word heirs, and showing that the testator meant, that the estate should descend to some heirs male, the Courts make it descend in the only way in which it can descend

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(a) *Cro. El.* 478. S. C. *Mo.* 424.(b) 6 *Term Rep.* 352.(c) 1 *Doug.* 341.(d) *Gillb. on Devise*, 31.

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to heirs male only, viz. in tail-male. In the case of *Abraham v. Twigg*, it is expressly held, that a feoffment to *A.* and his heirs lawfully engendered, will not carry an estate-tail; which Lord *Hale*, in his note, calls *Dormer's* case. It is said there in argument, that though not limited to the heirs of the body, yet being limited by way of use, which is to be expounded according to the intent, and as wills, it shall be construed as an estate-tail; but all the Justices held, that though it were by way of use, it differed not from other gifts by deed, and should not have any other construction. The Court there refer to 9 *H.* 6. 25. which is the case of a devise in *London*, and the principal point is not there determined, but the bar and the Court speak of this doctrine with respect to limitations in tail; and the same is recognized in *Bro. Abr. Tail. pl. 3.*, where it is thus expressed. "By *Paston, J.* If land be given to one for life, the remainder to the heirs male of *J. N.* and to the heirs male of their body, by gift, or by devise, yet this is no entail, for that this word, the body of *J. N.*, is wanting in the beginning of the remainder, and therefore the subsequent words cannot make this an entail." So, at that day, the distinction as to the words heirs male giving a fee, was not taken, but a question was made whether the subsequent words "heirs male of their bodies" could be referred to *J. N.* and it was held that they could not. *Beck's* case (a) supports *Abraham v. Twigg*, and puts it on the distinction of the want of the word *de*. In the report of the same case in *Moor*, directly the reverse is said, but it is, on examination, seen to be applied to a different argument. The question there, is thus stated (b), whether the limitation to the use of *Gabriel* and his heirs male lawfully begotten, without the words heirs male of the body, and for default of such issue over, as before, made an estate tail or a fee simple in *Gabriel* (the proposition thus including the words of limitation over, which would in a will be material, but it there confessedly seems rather to rest on the remainder over, which in a deed is immaterial). *Church v. Wyatt* is to the same effect. "If both should die without fruit of their bodies, then, that *J. S.* should sell, and he willed that the one should be the heir to the other." Many cases, beginning with *Clatche's* case (c), show that in a will, such an intent of giving over, designates special heirs, and an entail. So, in *Church v. Wyatt*, the Court hold that there are two expressions of remainder over, either of which

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(a) *Litt.* 344.

(b) *Mo.* 424.

(c) *Dyer*, 330. b. pl. 20.

make an entail. The case, then, makes nothing for the Plaintiff. Those who have written on wills, have thought the point so clear that they have not noticed it, except in those two authorities. And what are those? Lord *Hale* makes a minute in the margin of his *Coke upon Littleton*, which, by those to whose hands the book came, is communicated to the learned editors, but was not intended by the author for publication. It is not even put as Lord *Hale's* own opinion; he refers to the case, and his note bears the marks of haste; he cites *Roll* right, the year of the queen and the page in *Moor* wrong; and he cites *Bedell's* case, which is wholly irrelevant; he meant *Beresford's* case; he puts this as a principle positively decided by the Court, whereas the Court, in *Church v. Wyatt*, put it expressly on the two expressions of the intent of the remainder limited over. As to *Comyn's Digest*, when the author states a principle on his own authority, he is entitled to great weight, but when he professes to extract a case, it is necessary to look at the case, and to see whether he has correctly considered it. It is singular that in the index to *Moor* (title Tenant in Tail), it is stated in this way, and therefore it is probable that both those learned persons used some abridgement, into which that error had crept. *Comyn* says (a), "Devise to one and the fruit of his body, makes an estate in tail. So, to *A.* and his heirs *legitimè procreatis*," a very translation of the first part of the sentence in the index in *Moor*, but omitting the qualification, that it is accompanied with the words, that one shall be the heir to the other, is an estate in fee. A gift to one *et sanguini suo*, is a fee, *semini suo*, an entail; for the first is applicable as well to the collateral as to the lineal line of heirs. *Gilbert* gives that reason, and there are abundant authorities for it. It is not necessary to contend that the words lawfully begotten are words of surplusage, but they are tautologous. The definition of an heir is *ex justis nuptiis procreatus*, as well of the heir general, as of the heir special. As to the context, the words "for ever" would not prevent the estate from passing to special heirs, but they strongly savour of a fee. It is objected, that because the testator in the devise of his cottage in fee, left out the words "lawfully begotten," he meant something different, when he added those words. That would be a very slender and unsafe ground for the Court. He uses the word issue four or five times in his will; the Court will not say that he uses it in a different sense;

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(a) *Com. Dig. Devise*, N. 5. p. 398.

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he says "die without issue", "without lawful issue", "without any issue"; does the one expression include illegitimate children, the others not? Nobody would say, that if he had given it to *Joseph* and his lawful heirs, that would give an estate tail; *and if the Courts let in a nice distinction founded on a variety of expression, it will encourage litigation; it is much more improbable that a testator should have meant, that the cottage should go in one way, and the land in fee simple, on which he himself resided, in another way, than that he should use two phrases, meaning legally the same thing, in the same sense. The words "land in fee simple" are strong for the Defendant. But further, if these words give an estate-tail, they must give the reversions of the cottage in like manner, which is going too far; for the devise is, I give all my land in fee simple, in *Millington*, except what is bequeathed to my wife (namely, only a life estate therein to his wife), to my son *Joseph*; he had before completely devised the remainder in the cottage, expectant on his wife's decease, to his son *Joseph*: so that the exception was completely unnecessary, —another instance of tautology. The provisions which were to take place in case of his children dying under twenty-one, apply only to his personal estate. There is a residuary bequest of personalty to the son, and if either of his children died under twenty-one, his or her legacy or share so dying should go to the survivor. There is a specific legacy of money to the daughter, and a residuary bequest to the son, which two would satisfy the terms of this ulterior bequest, and if both died under twenty-one he gives 200*l.* to his wife, and the residue to his nephew and nieces; their taking is not postponed to twenty-one, to whom no other estate had been given. The testator's intent is extremely doubtful, but the legal intent of the words gives an estate in fee; and then, as Lord *Hobart* says, the law must prevail.

[95] *Lens*, in reply. As to the distinction endeavoured to be established, it is too much for the Defendant to assume that the legal effect of the words is to carry a fee; if he means that they will have that effect, standing in a will, that is the very question. Lord *Hale* does not say that, as standing in a will, they would carry an estate tail; and, if the Defendant's argument is correct, Lord *Hale* must have misled himself also, and drawn wrong conclusions from the cases for his own use. Therefore the effect of the words cannot so lightly be got rid of. So, of the passage in *Comyn's Digest*, the principle would annihilate the authority of Chief Baron *Comyn*, that when he extracts a case, it has no further authority than any other man extracting the case would give

give it. The manuscript of Lord *Hale* is of great authority, for it points to the distinction between wills and deeds, which the Defendant's counsel does away, and requires the same precision in a will, as in a deed, whereas it is a well-known principle, that a testator is supposed to make a will when he is *inops consilii*. The testator did not conceive that he was adding something tautologous, and it is material that this was the second, and not the first expression. It is said it may be tautologous, but not superfluous; but that is saying only that he means to import the same thing. But does he mean the same thing? If prone to tautology, he would give to both the same addition. The words for ever are not even an ingredient; they are found in *Ossulstone's* case, and every testator founding a new stock, hopes it will last for ever. When he says issue, whose issue does he mean? the issue of some other, or of the subject of whom he is speaking? The Defendant is not warranted in concluding that the case in *Moor* means nothing. The case cited from *Brook (a)*, of a limitation to the heirs male of *John Nokes*, and to the heirs male of their bodies is irrelevant; for now it would be clearly held, that the heirs male took as purchasers. He agreed to the rule in *Lane v. Stanhope*; the exception of the cottage is not, as supposed, superfluous; it shows that the testator notices that he has given a fee in that property to his son, and does not mean to disturb it. *Abraham v. Twigg* is not materially different in *Moor* and *Croke* from what it is stated to be in *Beresford's* case; and the collateral observation of the one reporter that so it is, of the other, that so it is not, in the case of a will, is immaterial, for the principal case there was not the case of a will. *Shelly v. Earsfield (b)*; there was a limitation to Sir *T. Earsfield*, and the heirs of Sir *T. Earsfield* begotten and to be begotten, and for want of such issue, then over, and it was held an estate ~~tail~~, even in a deed, yet there were no words pointing to the body of Sir *T. Earsfield*. It cannot be supplied by the subsequent words; for if it means on failure of heirs generally, it would be too remote, yet there were no words *de se*, or *de corpore*. It is not therefore clear, that even in a deed, this would not be an entail; but it is not necessary to argue to that extent. Throughout this will the testator's intent is manifest: he was providing for his children, and the heirs of their bodies, and not for remote relations. Lord *Hale's* haste, therefore, is only

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(a) *Bro. Abr., Tail*, pl. 3.

(b) 1 *Chanc. Rep.* 110, 206.

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in the paging, and not in extracting from the case a short canon for his own use. If therefore it were necessary to determine this case on the mere words of the devise, this would be sufficient to decide it; but by going to the other parts of the will, without confining the view to this narrow ground, it is clearly seen that he took only an estate tail.

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Bosanquet rejoined on the case of *Shelley v. Earsfield*, that it seemed to be only a question on a limitation over by deed, on which there were formerly many doubts, whether the same construction should prevail as on a will; but supposing the case law, it is favourable to the Defendant.

Cur. adv. vult.

The following certificate was afterwards sent to the Court of Chancery.

We have heard this case argued; we have considered it, and are of opinion that an estate tail was given to *Joseph Hulse*, the father of the Plaintiff *Hannah Nanfan*, by the will of the testator *Peter Hulse*, in the premises wherein the said testator *Peter Hulse* lived at the time of making his will.

V. GIBBS.
 J. HEATH.
 A. CHAMBRE.
 R. DALLAS.

July 2.

MOORE v. BOWMAKER.

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A plea by a surety that a judgement was obtained against his principal by fraud, viz. by the plaintiff in that suit fraudulently procuring the Defendant to confess, and by the Defendant falsely and fraudulently confessing the action, without averring more, is bad.

THE Plaintiff declared, as assignee of a replevin-bond, against the Defendant, as one of the sureties in the bond, which the Plaintiff showed to be conditioned, in the usual form, to be void, if *Shirreff*, the principal, did appear at the then next great court to be holden in and for the liberty of *Bury St. Edmunds*, and did prosecute there with effect his suit, which he had commenced against the Plaintiff, for the taking and *unjustly detaining of *Shirreff's* goods therein mentioned, and did make a return of the goods, if a return should be adjudged; and averred an appearance by *Shirreff* at the great Court, and plaint there levied, and the removal thereof at the Plaintiff's instance,

The parties to a replevin suit referred to arbitration the time of payment of the rent, with certain claims of the tenant on the landlord for damages, with liberty for the tenant to deduct them, when awarded, from the rent, and agreed to suspend proceedings in replevin pending the reference. After award made, held, that the sureties in the replevin-bond were not thereby discharged.

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by *accedas ad curiam*, into this Court, and that such proceedings were thereon had, that it was considered by this Court, that the Plaintiff should be thenceforth dismissed thereof without day, and have a return of the goods; and avers that *Shirreff* made no return of the goods, whereby the bond became forfeited to the chief steward, and shows an assignment to himself. The Defendant pleaded in bar, secondly, that that judgement was obtained by the Plaintiff by fraud and covin, that is to say, by the Plaintiff in collusion with *Shirreff*, after the taking of the supposed bond, and before the giving of the judgement, fraudulently causing and procuring *Shirreff* falsely and fraudulently to confess, and *Shirreff* accordingly falsely and fraudulently confessing the Plaintiff's action. Thirdly, he pleaded, that after the making of *Shirreff*'s plaint, and before any judgement was given therein, it was agreed between the Plaintiff and *Shirreff*, without the knowledge or consent of or any notice to the Defendant, among other things, that all differences then subsisting between the Plaintiff and *Shirreff* touching certain matters, that is to say, the construction of a certain agreement dated 30th *July*, 1810, as to the time of payment of the rent, the buildings to be erected upon *Poslingford-Hall* farm, the claims of *Shirreff* for loss of stock, and for breach of agreement on the Plaintiff's part, with respect to the buildings and loss of stock, should be referred. And that *Shirreff* should be at liberty to deduct all monies, which should be awarded due to him, out of the arrear of rent; and that, pending the reference, no proceedings should be taken in the replevin; and that thereupon afterwards, on the 7th *July*, 1814, the arbitrators awarded that the Plaintiff should, on or before 8th *August* then next, pay or allow to *Shirreff* 40*l.* in respect of certain buildings therein mentioned, and 400*l.* as a compensation for the loss of stock sustained by *Shirreff*; and the arbitrators appointed the 8th *August* for payment of all money then due from *Shirreff* for rent under the agreement of 30th *July*, 1810, as were mentioned in the agreement of 23d *March*, and as were thereby allowed to be deducted: and the Defendant averred that the rent in the declaration supposed to be due to the Plaintiff, and for which such distress was made, replevin granted, and bond taken, was a subject of that reference, and was comprehended in the money by the award mentioned to be due from *Shirreff* for rent, and appointed thereby to be paid, of which the Plaintiff had notice. The Plaintiff demurred to these *plcas*, and assigned for cause

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of demurrer to the second plea, that the Defendant had thereby attempted to plead and put in issue matter of fact, in order to impeach the validity of the judgement therein mentioned, whereas the validity of a judgement in a court of record could not be impeached or investigated; otherwise than by writ of error. And he assigned for causes of demurrer to the last plea, that the matters therein alleged did not constitute any ground of defence; and that even admitting the same matters might entitle the Defendant to relief in a court of equity, yet they afforded no legal answer to the action.

Best, Serjt., in support of the demurrer, insisted that it was incompetent for the surety to show that the judgement against the principal had been obtained by fraud. "It is most clear, that the merits of a judgement can never be overhauled by an original suit, either at law or in equity. Till the judgement is set aside, or reversed, it is conclusive as to the subject-matter of it, to all intents and purposes" (a). An application had already been made in this case to set aside the judgement, which was unsuccessful (b). A court of equity can relieve where there is ground for it, and can prescribe the terms of relief. Thus, though "it cannot set aside a judgement of a court of law, obtained against conscience, yet it will decree the party to acknowledge satisfaction upon that judgement, though he has received nothing, because obtained where nothing was due" (c). So, "an executor obtained judgement in debt in this Court (B. R.), and was afterwards, on an information here, convicted of forging the will. It was also made void by sentence in the ecclesiastical court. Whereupon the Court was moved to vacate the judgement, which they ordered accordingly" (d). But the judgement could not have been avoided by pleading; it was necessary that the Court should order it to be vacated.

Vaughan, Serjt., in support of the plea. In an action on a judgement, it is a common practice to plead *per fraudem*. The question of fraud cannot be tried on a writ of error, as the Plaintiff has supposed. The obligation of the surety in the replevin-bond is, that *Shirreff* shall prosecute with effect, and that if the judgement shall award a return, the return shall be made. Whether the action be prosecuted with effect, is a material allegation, and therefore traversable; and it never was disputed but

(a) By Lord Mansfield, C. J., *Moses v. Macfarlane*, 2 Burr. 1009.

(b) *Ante*, VI. 381.

(c) *Per* Lord Hardwick, *Barnesley v. Powel*, 1 Ves. 289.

(d) 1 Vent. 78. *Anon.*

that strangers might at all times falsify a judgement, fraudulently obtained against another; and that, whether it be in the ecclesiastical or temporal courts. *Fermor's case* (a). Recovery in dower, or any other real action, upon a good title against the tenant, who comes to the land by wrong and covin, is void and of no force. The Duchess of *Kingston* was indicted for bigamy. She defended herself on the ground of a sentence in a suit of jactitation of marriage in the ecclesiastical court, in which it was decided that she was not married to Mr. *Hervey*; and it was submitted to the twelve Judges, whether that sentence was conclusive; and if conclusive, whether it was conclusive against strangers (b). *De Grey*, C. J., in his judgement lays it down, that "Fraud is an extrinsic collateral fact, which vitiates the most solemn proceedings of courts of justice. Lord *Coke* says, it avoids all judicial acts, ecclesiastical and temporal. In civil suits, all strangers may falsify for covin, either fines, or real or feigned recoveries, and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not essoigning, or not demanding the view, or by suffering judgement by confession or default, or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas." Fraud is a fact to be found by the jury, and it cannot be put in issue otherwise than by an averment, and trial by jury. *De Grey*, C. J., says, (c), "In more modern cases the question seems to have been, whether the parties should be permitted to prove collusion, and not seeming to doubt but that strangers might." This is the proper court in which to pursue that remedy; being the court in which the fraud is committed. If two by fraud obtain a judgement to injure a third person, the Court will set it aside: and if they will set it aside on motion, they certainly will let it be available for defence in this more solemn shape. It is a matter which avoids the plea of judgement recovered by an executor, that it is entered or kept on foot by fraud (d). In convictions on the game laws, it is usual to the plea of a previous conviction, to reply *per fraudem*. This judgement is unfairly obtained, fraudulently and covinously, and that saps the foundation of it. It is not necessary to state on the record the covinous and fraudulent means, which is merely the evidence. *Moses v. Macfarlane* only proves

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(a) 3 Co. 78.

(b) 11 St. Tr. 230.

(c) *Ibid.*(d) *Anon.* 1 Vent. 329. 331. reported by the name of *Knigh v. Peachy* in *T. Raym.* 301. 2 Jon. 109. 1 Freem. 465. Vin. Ab. Fraud, K. a 7.

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that a judgement unimpeached shall be binding between the parties; but here the Defendant, a stranger, comes to impeach the judgement. He does not, however, aim to set aside this judgement, but only to avoid its effect as between the Plaintiff and himself, who is a stranger. As to the last plea, it discloses this, that the Plaintiff and Defendant in the replevin agreed to refer all matters, and that the replevin-suit should be suspended. The substance of the plea is, that the cause why the Plaintiff in the replevin has not prosecuted with effect, is, that the Plaintiff in the present action has desired it should not be done. In the case of *The Duke of Ormond v. Bicerley* (a), it was held, that where the Defendant in the replevin suspended the proceedings by his own act, namely, by filing a bill in the Exchequer, and obtaining an injunction, pending which the Plaintiff in replevin died, this was a prosecution with effect, because there was neither a nonsuit, nor a verdict against the Plaintiff in replevin. The Plaintiff has given time to the Defendant in the replevin, and wherever the situation of a surety, by time being given to the principal, is altered for the worse, the surety is, as in the case of bail, discharged. *Bowsfield v. Tower* (b). *Croft v. Johnson* (c). It has been so held on bills of exchange. *English v. Darley* (d). The Defendant is therefore discharged from his obligation.

Adjournatur.

GIBBS, C. J., now delivered judgement.

The Court have looked into this case, and find it not necessary the Plaintiff's counsel should reply. [His Lordship here fully stated the declaration.] What is the cause of action? The Plaintiff distrains for rent on *Shirreff*, who again takes the goods distrained out of the possession of the Plaintiff, on entering into a bond, in which two others join him, conditioned that if he shall appear and prosecute with effect, and if a return shall be adjudged, and he shall make return, then the bond shall be void. It is too clear to argue; he is bound to do both, as well to prosecute with effect, as to make return, if it shall be adjudged, and if he omits to do either, the bond is forfeited, and he is liable to the penalty. The breach averred, is, that *Shirreff* did not make return, and inasmuch as it was necessary he should do both, the breach set out is good. The Defendant pleads, first, *non est factum*; secondly, that the said judgement for a return was obtained by the Plaintiff by fraud and covin: the only ex-

(a) *Carth.* 519. *Co. Dig. Replevin*, D. p. 219.(c) *Ante*, V. 319.(b) *Ante*, IV. 456.(d) 2 *Bos. & Pull.* 61.

planation

planation which he gives of this, is, *viz.* by the Plaintiff in collusion with *Shirreff*, after taking the bond, and before the judgement, causing *Shirreff* falsely and fraudulently to confess, and by *Shirreff* falsely and fraudulently confessing the said judgement to the Plaintiff: that is, in fact, saying the Plaintiff and the Defendant agreed together, falsely and fraudulently to cheat one another! Other persons are to be affected by this plea: if this agreement were said in the plea to be for the purpose of falsely and fraudulently deceiving the pledges in the replevin, it might be different; but, as it is, the Defendant only says that these two persons committed a fraud, not saying with what view, or for what purpose; he cannot plead fraud generally, in this way. How can this be between these two parties simply *per se*, a fraud? The plea therefore shows no bar to the action. This then disposes of the second plea; but there is another plea, and the facts thereof [which his Lordship here fully stated] are relied on to show that the Plaintiff is not entitled to enforce the replevin-bond against the Defendant, who is the surety. It is difficult to see any one of these facts which is not greatly in favour of the Defendant in the replevin bond: for the agreement authorizes a stay of the action of replevin, and the tenant is empowered to deduct from the rent sums which he could not otherwise deduct. All this is in favour of the tenant and his sureties. It is said, it delays the proceedings, and so is a prejudice to the surety; but delay of proceedings is no prejudice to a Defendant. This has no similitude to the case of the bail on an arrest. The reason why delay in that case discharges them, is, that it impedes the bail of the remedy which they have by rendering the principal; but there is no ground here to say, that the Plaintiff has delayed the Defendant of any remedy, by reason of his not having pursued his own remedy with the utmost diligence against the principal. We are of opinion, therefore, that this plea also is bad, and that judgement must be pronounced

For the Plaintiff (a).

(a) See *Moore v. Bowmaker, ante*, VL 381.

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Sir G. P. possessed of an estate *pur autre vie*, and seised of lands in fee, in the counties of D. and N., and of equitable and legal estates for life in seven other counties, with remainder to his first and other sons in tail male, with remainder to himself in fee, and being possessed of a long leasehold, and entitled for his life to the dividends of certain trust-money, with remainder to his children absolutely, and possessed of other personal effects, devised the estate *pur autre vie* to E. Lester for life; remainder to R. S. absolutely. He devised all other his estates, real and personal, wheresoever situate, which he was possessed of or entitled to, and of which he had power to dispose, to E. Lester, her heirs, executors, &c. In case the testator's son

should die without issue, he devised all his real estates, not therein before disposed, situate in all the nine counties named, and all testator's personal property in any of the public stocks or funds, to E. Lester for life; remainder to R. S. in fee. Held that E. Lester took an estate in fee in the testator's fee-simple lands in the counties of D. and N.

Whatever number of parties there may be to a suit in equity, out of which a case is directed for this Court, the Court will hear only one counsel on behalf of each separate interest.

THIS was a case sent by the Master of the Rolls, for the opinion of the Judges of this court.

Sir George Pauncefote, Bart., in his life-time, and at the time of his death, was seized of an estate of freehold in a capital mansion called *Preston Court*, with divers premises in the parish of *Preston*, in the county of *Gloucester*, during the lives of three persons, and the life of the survivor of them, at a certain rent payable for the same. “He (a) had also contracted with one *W. Sherrard* for the purchase of the fee-simple of certain lands in the county of *Leicester*, part of which lands, by lease and release of 18th and 19th May, 1807, were conveyed to him and to his heirs, to the use of *Sherrard*, his executors, &c., for one thousand years, for securing 3000*l.* and interest, and subject thereto, to the use of a trustee for five hundred years, to raise on the request of Sir G. Pauncefote, his executors, &c., 200*l.* for his and their benefit; and after the *determination of those terms, and in the mean time, subject thereto, to the use of the said Sir G. Pauncefote and his assigns for his life, with remainder to trustees to support contingent uses and estates, with remainder to the use of the Defendant Sir Robert Howe Bromley, and the heirs male of his body, with divers remainders over, and the ultimate remainder to Sir G. Pauncefote in fee: and the residue of which lands were, by lease and release of the same date, conveyed to Sir G. Pauncefote and his heirs, to the use of *Sherrard*, his executors, &c. for one thousand years, for securing 3000*l.* and interest, with remainder to trustees, their heirs, and assigns for ever, upon trust, in case Sir G. Pauncefote, his executors, &c., should pay to *Sherrard* 3000*l.* and all interest within five years from the date of that release, then, but not otherwise to convey the said lands to and to the use of Sir

(a) The parts included between inverted commas were added upon the suggestion of the Court, after the first argument, for the purpose of showing the state of Sir George Pauncefote's property about the time of making his will.

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G. Pauncefote, his heirs and assigns for ever; and in the mean time to permit and suffer him and them to receive the rent to his and their own use. But in case *Sir G. Pauncefote*, his executors, &c., should not actually pay to *Sherrard* the sum of 3000*l.* and interest within the five years, then upon trust, as soon as the five years should expire, to convey and assure all the same lands to the use of *Sir G. Pauncefote* and his assigns for his life, with remainder to the use of the Defendant *Sir R. H. Bromley* and his heirs male, with divers remainders over, and the ultimate remainder to *Sir G. Pauncefote* in fee." He was also seised of an estate for life, in certain lands in the counties of *Huntingdon, Gloucester, Hereford, Worcester, Lincoln, Nottingham, and Leicester*, "under the settlement made in pursuance of articles entered into, previously to his marriage with *Hester Curzon*, spinster, dated 18th *May*, 1789, which said *Hester Curzon* was living at the date of his will, and is yet alive, having had a son, the Defendant *Sir R. H. Bromley*, Bart., who was the only child of the marriage, and at the date of the will had attained the age of twenty-one years," with remainder to his first and other sons of that marriage in tail male, "with remainder to the daughters of that marriage, as tenants in common, in tail male, with cross remainders between them in tail," and with the ultimate remainder to himself, *Sir G. Pauncefote*, in fee; he was also seised of an estate in fee simple in messuages, lands, and tenements, in the counties of *Nottingham* and *Derby*, and in the town and county of the town of *Nottingham*, subject to certain mortgages affecting the same, "made to the trustees of his marriage settlement, and was also under another indenture of settlement, dated 18th *May*, 1779, interested in 3*l. per cent.* annuities and *South Sea* annuities, and the said mortgages on his own estate, being the securities for property, which had been by the said second-mentioned settlement settled upon trust to pay the interest, &c., thereof to *Sir G. Pauncefote* and his assigns during his natural life, and, after his decease, to pay the same to Dame *Esther* his wife, for her life, and after the decease of the survivor of them *Sir G. Pauncefote* and wife, upon trust to sell and transfer the same, and pay and dispose of all and every the sums of money arising by such sales or transfers, and the dividends and interests and proceeds thereof which should accrue, from the death of *Sir G. Pauncefote*, until such sales or transfers, in manner following, viz. in case there should be any child or children of *Sir G. Pauncefote* on the body of the said Dame *Esther* his wife, other than and except an eldest or only son, to pay and

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dispose of all and every the sum and sums of money which should arise from such sales or transfers, unto or amongst all and every such child and children (not being any of them an eldest or only son) in equal parts and proportions, share and share alike, and if there should be but one such child, then should pay the whole to such one child, with benefit of survivorship between the younger children, if any daughter should depart this life before she should attain her age of twenty-one years, or unmarried, or any son should depart this life, or become an eldest son, before he should attain his age of twenty-one years; and upon further trust, that if there should be issue of Sir G. Pauncefote on the body of the said Dame Esther an only son, and no other child, who, being a son, should live to attain the age of twenty-one years or, being a daughter, should live to attain that age or be married, in trust for such only son, his executors, &c., and in case there should be no child who should live to attain a vested interest, then as to one moiety of the said trust monies, for Sir G. Pauncefote, his executors, &c., and as to the other moiety, in trust for Dame Esther, in case she should happen to survive Sir G. Pauncefote: but in case she should die in his life-time, then as to the last-mentioned moiety, in trust for such person and persons as she should by will appoint, and in default of appointment, for her executors or administrators. He was also absolutely possessed of a leasehold messuage in *Russell Square, Middlesex*, and of household furniture, and other personal estate and effects." Sir G. Pauncefote made his will in writing, dated 28th April, 1807, executed and attested as by law required for passing freehold estates of inheritance, in the words following, viz. First, I devise and bequeath all that my capital mansion-house called *Preston Court*, with the messuages, farms, lands, tenements, and hereditaments thereto belonging, situate in *Preston* in the county of *Gloucester*, unto *Elizabeth Lester*, commonly known by the name of Mrs. *Edwards*, to hold to her, and her assigns, for her natural life, with power to raise such sums of money as may be necessary from time to time, to renew the lease of the estate at *Preston*, and charge the same thereon; and after her decease, I devise and bequeath the same estate and premises to *R. Smith*, Esquire, his heirs, executors, administrators, and assigns for ever, upon condition of his assuming and bearing the name and arms of *Pauncefote* only; also I devise and bequeath all other my estates, both real and personal, wheresoever situate, which I am possessed of, or entitled to, and of which I have power to dispose, unto *Elizabeth Lester*, other-

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wise *Edwards*, her heirs, executors, &c., respectively for ever, charged with the payment of my just debts, funeral expenses, and the legacies of twenty guineas each, which I give to *Jonas Bettison*, Esquire, and the Rev. *Ralph Heathcote*. And in case my son *R. Howe* shall die without issue of his body lawfully begotten, then I devise and bequeath all my manors, messuages, tenements, and real estates not hereinbefore disposed, situate in the several counties of *Huntingdon, Gloucester, Hereford, Worcester, Lincoln, Nottingham, Leicester, Derby*, and the town and county of *Nottingham*, and also all my personal property in any of the public stocks or funds, or elsewhere, unto the said *Elizabeth Lester*, otherwise *Edwards*, and her assigns during her natural life, without impeachment of waste: and after her decease, I devise and bequeath all my said real and personal estates last-mentioned unto the said *R. Smith*, his heirs and assigns for ever, upon the same condition of assuming the name and bearing the arms of *Pauncefote* only. And I constitute the said *Elizabeth Lester*, otherwise *Edwards*, and *Jeremiah Smith* my executors." The devisor died on 17th August, 1808, without having revoked or altered his will, and left the Defendant, Sir *R. H. Bromley*, his only son and heir at law, and the said *Elizabeth*, the wife of the said *Thomas Rickards*, late *Elizabeth Lester* otherwise *Edwards*, him surviving.

The question submitted to the Court was, what estate or interest the said *Elizabeth Rickards*, late *Elizabeth Lester* otherwise *Edwards*, took in the messuages, lands, and tenements of the devisor in the county of *Derby* and in the town and county of the town of *Nottingham*.

This case was twice argued: first in 1815, by *Blosset*, Serjt., in *Easter* term for the Plaintiffs, who were the creditors and legatees of Sir *George Pauncefote*, and in effect, for the Defendant Mrs. *Rickards* also, her interest being the same as that of the creditors: and by *Lens*, Serjt., in *Trinity* term for the Defendant Sir *Robert Howe Bromley*, the heir at law; the Court stopping *Best*, Serjt., who would have argued after *Lens*, on behalf of the Defendant Mrs. *Rickards*, upon the ground, that they only permit one counsel to be heard on behalf of each interest, in a case sent them from the Court of Chancery, how many parties to the suit soever there may happen to be. The Court, in *Easter* term 1815, thinking that the effect which the several bequests of the personalty and the state of the testator's personal property might have, in elucidating the construction of the will, had not been sufficiently

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sufficiently considered in the first argument, directed the case to be amended and a second argument to be had. The case, having been amended as it now stands, was accordingly, in *Trinity* term 1816, again argued by *Best* for the Plaintiffs and the Defendant *Mrs. Rickards*, and by *Shepherd*, Solicitor-General, for the Defendant *Sir Robert Howe Bromley*, on which occasion, *Blosset* was heard in reply.

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For the Plaintiffs and *Mrs. Rickards*, it was contended that the latter took a fee-simple in the estates in *Derbyshire* and the town of *Nottingham*. There is evidently some mistake in the will, and the mistake was, either that the testator thought he had no power to dispose of those estates of which he was seised only in reversion, or it was the insertion of the counties of *Derby* and the town of *Nottingham*, in the latter clause, under the idea that he had only a reversion in fee in them. The general intention to be collected from the whole will, was, that, whereas the chief bulk of the testator's property was entailed upon his son, all that he could himself dispose of should go to *Mrs. Rickards*. Where the general intent in a will is plain, that will control the legal operation of the words of the devise. *Cowper v. Lord Cowper* (a), and *Ulrick v. Litchfield* (b). The greater part of the testator's personal estate was tied up to the same uses as the testator's entailed real estate. The testator argued thus—I have the disposal over certain real and personal property: I wish to do nothing for my son; I wish to give largely to this lady: I give her two small estates in fee, and my personalty, wherewith she is to pay my debts, and keep the surplus. But I have also the reversion of much larger estates; they are greater in value than it is prudent to give her absolutely, I therefore give her those larger estates for her life, with remainder to *Robert Smith*, who shall take the name of *Pauncefote*. If the first devise had stood alone, it would clearly have given her a fee in all the realty, and the absolute possession of all the testator's personalty, subject to his debts. But the testator goes on to give all that he had not before disposed of. This second clause, therefore, does not give any thing, if all has been before disposed of. But it is not nugatory, for the testator looked on that property which he had not in possession, and which possibly never might come into possession, as property which he had not power to dispose of, that is, not to dispose of it immediately in remainder after his own decease: and he therefore considered that he had not devised,

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(a) 2 P. Wms. 720, 741.

(b) 2 Alk. 374.

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by the second clause, that property which he expected in reversion after the decease of his son without issue. The first clause therefore gives her an estate in fee in that portion of his land which he could give in fee in possession; under the second, she takes a reversionary life-estate in that large bulk of his fortune, which he did not think it fit to give absolutely from his family in favour of this lady; thus, effect will be given to both clauses of the will, though perhaps not to every word of it (for in any construction whatever some words must be rejected), and the intent of the testator is performed. The other construction is absurd, that having first given all in fee, he then cuts down the devise in fee of all to a mere life-estate. But there is another ground on which this may be put; the first clause is a clear distinct devise, and must not be cut down by implication. *Skerratt v. Oakley (a)*. A devise of a leasehold at *Wrentnall* to *W.* is not done away by a subsequent bequest of money to his wife in full of all demands, except the estate for life of the wife and her assigns, in the premises at *Wrentnall* aforesaid. The Courts have in some instances taken (b) on themselves to correct evident mistakes in wills, and here the mistake is palpable. Thus in *Burr v. Devall*, devise of his *Essex* estate to his eldest son and the heirs of his body, and of his *Middlesex* estate to his youngest son and the heirs of his body, and if either of his sons died without issue, then his estate to go over to the survivor, and if both his sons died with issue, then he devised the whole estate to the Plaintiff: the Court held that the testator must have meant the devise over in case both his sons died without issue, and gave effect to the will accordingly. The testator must have meant to give an estate in fee in that property in which he had an estate in fee in possession, not in that in which he had only a reversion in fee, otherwise the provision not only would be extremely distant and uncertain, but also his debts, which were large, would remain unpaid. It cannot be imagined that the testator meant to provide for payment of his debts after an indefinite failure of issue of his son. Secondly, the whole would be void, unless the Court could imply an estate tail to be devised to his son; the Defendant's argument, therefore, imagines, that the testator gave that which

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(a) 7 Term Rep. 49.

(b) 8 Mod. 59. The reporter has not been able to find the decision here stated; upon the trial of the issue out of Chancery, the verdict was for the Plaintiff, affirming the devise *ipsis terminis*, and not correcting the mistake.

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is nothing in value in point of fact, and amounts to nothing in point of law, as the fund for a purpose which requires present payments. There are cases in which an estate, given over to *A.* after failure of issue of *B.*, gives an estate tail to *B.* Those are cases where the question has arisen, what is to become of the estate, until the decease, or decease without issue, of *A.*, on which event it is given over, and an estate for life, or in tail, to *A.* himself has been implied, but here that implication is rebutted by the circumstance that *A.*, the son, already has himself an estate in tail. In *Popham v. Banfield* (a), it was argued, that by the codicil, by implication, an estate tail was given to *A.*, but the Court said, after an express estate given, we will not take it away by implication. The only way in which it is proposed to narrow down this first estate, is by an implication, which does not here arise. *Green v. Armstced* (b), "I will that *W. Green* shall have my house and lands in *Clay*. Item, I give my land and house in *Stukey* and elsewhere to *R. M.*" The last expression includes all his land, taken in its natural import, and therefore includes that given to his son, *W. Green*; yet, it was held, that though the testator had no lands but in *Clay* and *Stukey*, yet the word elsewhere would not pass the lands in *Clay*, and should rather be taken to be surplusage and void, than revoke the preceding express devise. *Loddington v. Kyme* (c), and *King v. Melling* (d). The Court say, an estate of inheritance expressly given before, shall not be overridden and narrowed down by any estate given afterwards by implication, but only by direct expression. It is by no means clear that the last devise is to prevail; it is not settled law that that construction shall prevail; where the same thing has been expressly given to two, it has been held to make a jointenancy (e). It is improbable that the testator should give a part in the next clause, if he were in a right and disposing mind, when he had immediately before given the whole.

Argument for the Defendant. The case is to be considered as if the testator had had no other lands than those in the counties of *Derby* and the town of *Nottingham*. In those estates Sir *Robert Howe Bromley* takes by this devise an estate-tail, with remainder to Mrs. *Rickards* for life, remainder to *Robert Smith* in fee. In construing every will the Court will give effect to the intent of the testator, but it must be an intent authorized by the words on the face of the will itself. All the parts of a will are

(a) 1 Salk. 236.

(c) 3 Lev. 431.

(e) Co. Litt. 112. b.

(b) Hob. 65.

(d) 2 Lev. 58. S. C. 1 Vent. 230.

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to be considered together, and all are to be reconciled, if possible: if not, it is to be seen whether the Court can exercise the power of rejection of any words; and this power must be limited to loose, inaccurate, or ambiguous words, or such as present a gross and palpable blunder. It is argued for the Plaintiffs, that the Court must expunge a part of this will. But there is a much safer rule of construction. Lord *Coke* says, "In one will where there be divers devises of one thing, the last devise takes place—*cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est.*" (a) "A devise that hath a good beginning, is sometimes overthrown by matter in the same will, sometimes by matter in another will, sometimes by extraneous accident, &c.; and as the latter will shall overthrow the former, so shall the latter part of a will overthrow the former." Lord *Alvanley*, M. R., in the case of *Simes v. Doughty* (b), speaks on the subject of rejection. The words of that will are not similar. "The will, he says, is almost incomprehensible, and perfectly inconsistent with itself. The question only is, which of the testator's meanings it is my duty to adopt. The rule with regard to cases of this sort is, if upon a general review of the will I can collect the general intention, or any one particular object, and there are expressions in the will in some degree militating with it; if I plainly see those expressions are inserted by mistake, I may reject them: but I cannot reject any words, unless it is perfectly clear they were inserted by mistake; and if two parts of the will are irreconcilable, I know of no rule but by taking the subsequent words, as an indication of a subsequent intention." Here the testator had property of three sorts. Estates *pur autre vie*, an estate for his own life in other counties than the two which are in question, with remainder in tail male to the Defendant Sir *R. H. Bromley*, with remainder in fee to himself; and he was seised in fee of certain estates in the counties of *Derby* and the county of the town of *Nottingham*. The second clause would give Mrs. *Rickards* a fee in those estates, of which the testator was seised in fee. There is no devise of any thing *nominatim*, in that second clause; in the third clause are words specifically describing those estates *nominatim*, and that specific description cannot be got rid of by the second, which particularizes nothing. The Court would do no violence to the testator's intent by transposing these clauses. If the third clause stood where the

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(a) *Shepherd's Touchst.* fol. edit. 451. marginal page 433.(b) 5 *Ves.* 247.

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second now does, that which is now the second would be reconcilable with the other, as a residuary clause. If it had thus stood, the first clause giving to Mrs. *Richards* for her life his estate at *Preston Court*, with remainder to *R. Smith*, and if the clause which is now the third had then next followed, it would have given an estate in tail general to Sir *R. H. Bromley*, with remainder to Mrs. *Richards* for life, with remainder to *R. Smith* in fee; and the now second, but then third, clause would have been a general residuary clause of all the testator's property real and personal, not therein before disposed of: it would have been all perfectly consistent, and nothing repugnant. It is clear that under the words, "In case my son *R. Howe* shall die without issue of his body lawfully begotten," the Defendant, Sir *R. H. Bromley*, would have taken an estate tail. *Newton v. Barnardine* (a). "And if my [second] son *Richard* die before he hath any issue of his body, so that my land do descend to *Gilbert* before he come to twenty-one years of age, then mine executors shall occupy it till *Gilbert* be twenty-one years of age." These words were held to make an estate tail in *Richard*. In *Waller v. Drewe* (b), "It is my will that if *W. Weeks* my son shall happen to die, and leave no issue of his body lawfully begotten, then, in that case, and not otherwise, after the death of the said *William* my son, I give and bequeath all my lands of inheritance in *L.* unto the said *Richard* my son." This also was held an estate tail. So in *Goodright, on Demise of Goodridge*, v. *Goodridge* (c). Devise of all the testator's lands to his wife for her life, except one field, which he devised to her in fee; "and if my son *Richard* happen to die without heirs, then my son *John* shall enjoy my lands;" and it was held, that the word "heirs" meant heirs of his body (d). "Note, that it was said by *Fineux*, that in every devise, the intent of the devisor ought to be taken; for if a man devise all his goods to his wife, and that after the decease of his wife, his son and heir shall have the house, notwithstanding that there was no devise made to the wife of the house by express words, but by implication, because the heir is not to have the house during the life of his mother, yet because the intent of the devisor was, that the son shall not have the house during the life of his mother, for this cause, she shall have an estate in the house for her life, to which all the Justices agreed." And this case, says *Willes*,

(a) *Mo.* 127.(c) *Willes*, 369.(b) *Com. Rep.* 372.(d) *Hil. term*, 13 *Hen.* 7. fol. 17. b. pl. 22.

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C. J., has been agreed to be law ever since. Wherever, therefore, an estate is given to one person in failure of issue of another, that other takes an estate tail. Unless this can be construed to mean that the estate shall go over in case Sir *R. H. Bromley* dies without issue living at the time of his decease, the remainder over to Mrs. *Rickards* is too remote and takes no effect. Considering the clauses as repugnant, there is no case where an express particularization of premises has been rejected, in order that it might not entrench on the supposed extent of loose general words. In *Green v. Armsteed*, Lord *Hobart* says, "the word 'elsewhere' shall rather be surplusage and void, than by such a loose word to alter a large, plain, and particular devise before;" nor is it material whether the devise to be altered, precede or follow the loose general expression. The third devise most minutely particularizes the testator's estates. In the only cases of rejection of words the mistake was manifest. In *Skerratt v. Oakley*, there was an obvious and palpable mistake, and the question merely was whether a wrong recital in a codicil should give an estate contrary to what the testator had given in his will. The cases of *Burr v. Davall* and *Green v. Armsteed*, are of the same class. They are nothing like the case of two repugnant clauses. By the second clause, the testator gives Mrs. *Rickards* all his personal property. By the third clause, he clearly narrows that bequest to a less than the absolute estate, viz. to an estate for her natural life. He had personal property in *Russell Square* and elsewhere. Sir *R. H. Bromley* had reached the age of twenty-one before the will was made, and the testator had therefore no disposable interest in the stock, and there is no sufficient reason for the Court to reject what the testator says, of his having personal property in the stocks or funds. In *Cosens's* case (a), the will was, "If it please God to take my son *George* before he hath issue, &c.," and it was held an estate-tail. In the only cases cited of rejection of words, the mistake was manifest, but here is no indication that the counties of *Derby* and of the town of *Nottingham*, are inserted by mistake, rather than *Gloucester* and the other counties named. But, it is said, he meant to give the reversion only. But the devise, whether of lands in possession, or lands in remainder, to a different person for a different estate than that estate which he had by a former clause given to an-

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(a) *Owen*, 29.

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other, is equally repugnant to the first devise. It was argued that Sir *R. H. Bromley* had the same estate by the settlement as this construction would give him. That is not so, for the estate given him in the settlement is an estate in tail male, which would not go to his daughters: this clause gives an estate in tail general, which would go to his daughters, and therefore gives him more than he before had. The argument is, that every thing, except the estates settled by the marriage-settlement, was by the second clause devised to Mrs. *Rickards* in fee; and that the Court must reject, in the third clause, all the counties in which any of the settled estates were; but if they were to reject every thing which is repugnant, they do away the principle, *ultimum ratum est*. It is supposed that because this is all in one will, this does not fall within the doctrine of divers devises, and that the provisions all form part of one devise. Lord *Coke* says, it is the same whether the repugnant clauses be in one or several wills. If the first clause had been made on one day, and the second on another day, it is clear that the last would be a complete revocation of the first, according to Lord *Alvanley*. The testator has transposed the clauses, and put his residuary clause into the middle of his will, instead of putting it at the end: the Court will therefore transpose the clauses, and let that pass by the second clause, which would pass by it if it were at the end, and let that pass by the last clause, which would pass if it were in the middle.

Arguments in reply. The testator's manifest intent is to leave his estates in possession to Mrs. *Rickards* in fee, and to devise those estates in which he had a contingent reversion, to Mrs. *Rickards* for life, with remainder in fee to *R. Smith*. If the testator had said, "I leave my estates in possession to Mrs. *Rickards* in fee, and my estates in reversion to her for life, remainder to Mr. *Smith* in fee, no doubt they would have passed to her the fee in the first, and a life interest in those estates in which his son had the estate tail, though the reversionary estates, being vested interests, are in one sense estates in possession. Those estates which he has power to dispose of, mean those of which he has present power to dispose, and whereof he can put the devisee into present possession. The testator could never mean to postpone the payment of his debts to the event of failure of issue of his son. In the third clause, he adverts to a power of disposal which he had in case of his son dying without issue; and, in order to tie down the devise to this, he raises, as it were, a fence round them, by the words 'not hereinbefore disposed of'. The

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counsel for the Defendant have avoided treating on these words, but they make an end of the case: they say, and truly, the estate tail given by implication by the third clause, would be an estate tail general, not in tail male, but that does not advance the argument, for the effect of the enlarged estate tail, supposed to be given to Sir *R. H. Bromley* by the will, would only be that by implication his daughters would take before the estate for life limited to *Mrs. Rickards*. It is not shown how the two clauses are repugnant or contradictory. There is a wide difference between a mere mistake and a repugnancy. This third clause is, "I give all my estate which is situate in the county of *Derby* and the county of the town of *Nottingham*, and which I have not before disposed of;" it happens that the testator has no estates in certain of the enumerated counties, except such lands which he had before disposed of, therefore none in those counties passed by this devise. To transpose the clauses, would make this a wholly different will. The question would then be wholly different, namely, whether an express devise, following an estate by implication, will revoke it; whereas the question now is, whether an estate by implication following an express devise, will revoke it. In *Goodright v. Goodridge*, the very point occurs, for there was given to the wife a precedent express estate in the lands, yet the wife enjoyed for her life, and it is not even mooted that the implied estate tail to *Richard* the son, revoked the devise to the mother of all for her life, and one acre in fee. The disposition of the personalty found by the amended case does not aid the Defendant. If the testator's peculiar expression of his "estates personal" did not mean those lands in which he had a chattel interest, but mean all his personal property, that disposition falls within the same reasons as the real estate. But in the third clause there is this difference, that there he gives all his messuages, &c., not hereinbefore disposed of, but he gives all his personal property without any such restriction. And if the words "not hereinbefore disposed of" do not govern the whole, the Defendant's argument, drawn from the personal property, does not advance his case.

Cur. adv. vult.

The following certificate was afterwards sent to the Master of the Rolls:

This case has been argued before us, we have considered it, and are of opinion that *Elizabeth Rickards*, late *Elizabeth Lester*, otherwise *Edwards*, took under the will of Sir *G. Pouncefote* an estate

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estate in fee in the messuages, land, and tenements of the devisor in the county of *Derby*, and in the town and county of the town of *Nottingham*, subject to the payment of the debts of the devisor, his funeral expenses, and legacies of twenty guineas each, given by him to *Jonas Bettison* and the Rev. *Ralph Heathcote*.

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R. DALLAS.

J. A. PARK.

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COOKE and Wife v. FARRAND and Others.

Devise of all the residue of what the testator should die possessed of, or in expectancy, of what nature or kind soever, in *Jamaica* or any other country, to his wife *E. Sanders*, for her natural life, reserving to her full power to will away any part or proportion of his said *residuum* at her decease; and after that period he bequeathed the residue of what was undisposed of by his wife, to his daughter, and the heirs of her body for ever: Held that wife had a power of appointment over the whole residuary estate.

THIS was a case directed by the Vice Chancellor for the opinion of this Court; the facts were these:

John Sanders being seised of certain real estates in *Jamaica*, and possessed of a considerable personal estate in *Jamaica* and *England*, made his will in writing, at *Jamaica*, dated 27th May, 1811, duly executed in the presence of, and attested by, three witnesses, and thereby, after giving certain pecuniary legacies, "All the residue of what he should die possessed of, or in expectancy, of what nature or kind soever, in that or any other country, he devised and bequeathed to his wife *E. Sanders*, for her natural life, reserving to her full power to will away any part or portion of his said *residuum* at her decease; and after that period, he devised and bequeathed the said residue and remainder of what was undisposed of by his wife, to his daughter *Sophia Cooke* (the Plaintiff), to her and the heirs of her body for ever. But in case of her death without issue, or in case of the death of her child or children, he then devised and bequeathed the said *residuum* with all the interest, profits, and increase, to *B. Farrand*, the Defendant, to him and his heirs for ever. And the testator appointed his wife executrix, and *B. Farrand*, *R. Bayley*, and *J. Rowe*, three other Defendants, executors of that his will: the testator died in April, 1812, in *Jamaica*, leaving the Plaintiff, *Sophia Cooke*, his only child and heiress at law; the Defendants *R. Bayley* and *J. Rowe* proved the will in *Jamaica*, and the Defendant *B. Farrand* proved the will in *England*. *E. Sanders* made her will in writing, dated 31st January, 1813, and executed in the presence of, and attested by, three witnesses, and thereby, after giving certain effects specifically,

specifically, she devised and bequeathed all her real estate, and all the residue and remainder of her personal estate and effects, in *England*, the *West Indies*, or elsewhere, of what nature or kind soever the same should be, whereof she had the power of disposing by virtue of the will of *J. Sanders*, or otherwise, after payment of her debts, funeral, and testamentary expenses, unto and to the use of the Defendants, *B. Farrand*, *J. Cathcart*, and *R. Oldershaw*, their heirs, executors, and administrators, according to the different natures and qualities thereof respectively, upon the trusts therein mentioned, and she appointed the last named Defendants her joint executors. *E. Sanders* was dead; the Defendants, *B. Farrand*, *J. Cathcart*, and *R. Oldershaw*, had proved her will. The question was, whether the power given by the will of *J. Sanders*, over his real and personal estates, to his wife *E. Sanders*, was or was not well executed by the will of *E. Sanders*, and whether the Plaintiffs, *Cooke* and wife, in her right, or the Defendants, *B. Farrand*, *J. Cathcart*, and *R. Oldershaw*, took any and what estate or interest in the real and personal estates of *J. Sanders*, by virtue of the wills of *J.* and *E. Sanders*, or of either, and which of them.

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This case was argued in *Easter* term, 1816, by *Best*, Serjt., for the Plaintiffs. Two rules of law are applicable to the construction of wills, which show that the Plaintiffs are entitled to an estate tail in this property. The first is, that the intent of the testator, when discoverable, shall prevail. The second is, the Court will advert to every part of a will to see what the intent is. The intent here is clear, not to give to the wife the whole property of the husband, and completely to disinherit the daughter; if the testator intended to give his wife every thing, the words, to the daughter and the heirs of her body, would have been omitted. If the wife was to have the absolute ownership, the estate to her, for her natural life, would not have been introduced. This is an illiterate testator, but his meaning is clear; as he thought it better to give his wife some control over the daughter, he gives the wife, after her estate for life, the power of giving any part or proportion. A part or proportion cannot mean the whole, it is contra-distinguished from the whole; therefore if a power be given over part, it cannot be a good execution of the power to dispose of the whole. There is a clear intent in the testator to give a vested interest to his daughter, subject to the power of his wife to dispose of some inconsiderable part. It never could be his intent to make his daughter a beggar, and give a power to

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his wife to dispose of the whole. In the cases on powers, a distinction has been made, where the excess of appointment can be ascertained, there the appointment is void only *pro tanto*, if the excess cannot be ascertained, then it is void for the whole. *Alexander v. Alexander (a)*. Here, if there be an excess, it is, from the terms of the will, impossible to ascertain where the excess is, and the appointment is altogether void.

Lens, Serjt., *contra*, insisted that the power extended to the whole. This Court could not regulate the discretion of the appointor. The doctrine of illusory appointments was wholly inapplicable, as *Mansfield*, C. J., observed in *Morgan v. Surman (b)*. He admitted the doctrine of *Alexander v. Alexander*, but denied that there was any excess here, therefore the appointment needed not the aid of such a severance; no limits are defined to the appointor's power.

[125] *Best*, in reply. No limits being defined, the power is void for uncertainty, for it is clear the testator meant the power not to extend to the whole. The consequence, that by the Defendant's construction, the wife has power to disinherit the child, is a strong argument against the improbability that such was the testator's intention.

The Court observed, that the case entirely turned upon the question, whether the power extended to the whole estate; for if it did not extend to the whole, the execution was clearly void; if it did, the execution was good; and therefore *Alexander v. Alexander* did not apply, for in that case it was clearly ascertainable how great was the excess of the power.

The following certificate was afterwards sent to the Vice-Chancellor:

This case has been argued before us: we have considered it, and are of opinion that the power given by the will of *John Sanders* over his real and personal estates to his wife *Eleanor Sanders*, was well executed by the will of the said *Eleanor Sanders*; and consequently that the Defendants *Banks Farrand*, *John Cathcart*, and *Robert Oldershaw* take the whole of the real and personal estates of the said *John Sanders*, by virtue of the said will of the said *Eleanor Sanders*, upon the trusts therein mentioned.

V. GIBBS.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

(a) 2 Ves. jun. 644.

(b) *Ante*, 1. 289.

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MELVILL v. GLENDINING and Another, Bail of COOMBE.

June 27.

BEST, Serjt., had obtained a rule *nisi* for exonerating the bail, upon the ground that the Plaintiff had given time to the principal, by taking from him certain bills of exchange.

Vaughan, Serjt., showed cause upon long affidavits, the substance of which was, that the bills were agreed to be taken without prejudice to the Plaintiff's proceeding at any time.

Best endeavoured to support his rule, upon the ground that the Court could not discharge it, without overturning the numerous authorities of former decisions exonerating the bail.

GIBBS, C. J. The Court is not about to lay down any new rule, but to act on the authority of cases that have been decided, not in the least passing beyond the limits of those authorities. The doctrine was first introduced in Courts of equity, that if the creditor gives time to the original debtor, the surety is discharged. It was founded on this principle; that every surety has a right to come into a court of equity, and require to be permitted to sue in the name of the original creditor. If the creditor gives time to the original debtor, he thereby prevents the surety from using his name with effect. The courts of law have held with respect to bail, that the bail are entitled to surrender the principal at any time, whenever the Plaintiff himself would not be precluded from taking or proceeding against him. If the creditor gives time to the principal, the creditor cannot during that time take or proceed against him, neither during the same period can the bail, who are therefore discharged. In this case, bills of exchange are given, and it is agreed, as it is said, that the Plaintiff should not proceed against the original Defendant, unless it should appear that the bills failed to be duly honoured. On the other hand, it is positively sworn that it not only was not agreed that the Plaintiff should not proceed while the bills were running, but that it was expressly agreed that the Plaintiff was to be at liberty to proceed during that period. It is said, and is not wholly incredible, that the Defendant said, "Proceed against me, or not, as you please: I throw myself on your mercy; but, to induce you not to proceed, I put these securities into your hands." The Plaintiff expressly swears, that he never made any agreement to give time.

The principle stated on which bail are discharged by a dealing with the principal.

Where a Plaintiff receives bills of exchange from a Defendant, with an agreement that he shall not be precluded from proceeding while the bills are running, the bail are not thereby discharged.

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The Plaintiff, therefore, not having ever given time to the Defendant, has never precluded himself at any moment from proceeding against the Defendant, and having never precluded himself at any moment from so proceeding, the bail were never at any time prevented from surrendering the Defendant; consequently, they would have been warranted in surrendering him at any time of this transaction, and therefore they are not thereby discharged from their liability. But, as this transaction might well mislead the bail, if unexplained, the rule must be discharged without costs.

Rule discharged.

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MEMORANDA.

IN *Trinity* vacation, *Arthur Onslow*, Esq., Serjeant at Law, was appointed one of his Majesty's Serjeants at Law.

In the same vacation *Samuel Marryatt*, of the *Middle Temple*, and *John Gurney*, of the *Inner Temple*, Esqrs., were appointed to be of the number of His Majesty's Counsel in the Law.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

1816.

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

MICHAELMAS TERM,

In the Fifty-seventh Year of the Reign of GEORGE III.

SMITH v. HORLOCK and Others.

THE following is the substance of a case stated for the opinion of this Court by an order of the Court of Chancery :
* *Holled Smith* being seised in fee of (among other real estates) an estate at *Bitteswell*, in the county of *Leicester*, in the occupation of *Joseph Tilley*, by his will dated 30th June 1795, and duly executed and attested to pass real estates, As to that his messuage lately erected in the common field of *Bitteswell*, called the *Mill Field*, with all outbuildings, yards, gardens, and
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Devise of land to the testator's son *T. G. Smith* for life, and after his decease, to the use of all the children of the body of his said son lawfully issuing (but exclusive of his eldest son, in case of there being two or more such children besides him,) their heirs and assigns for ever, as tenants in common; but in case his said son should depart this life without leaving any lawfully-begotten child or children, or issue of any such child or children, then, after his decease, to the use of the testator's daughters in fee. *T. G. Smith* suffered a recovery, and devised: Held that *T. G. Smith* had, at the time of devising, only an estate for life.

Devise that his executrix should borrow as much as was necessary to satisfy all demands, and repay it out of the money arising from rents during the minority of the testator's two children, *Ann* and *George*. He bequeathed all his property, both real and personal, to be divided equally between his two children, allowing that his son *George* should take, as a part of his share, the testator's farm at *B.* excepting the house and land which he bought of his father's trustees at *B.* together with the furniture thereof he left to them in common, and to the longest liver in fee-simple, and that his children should be put into their respective shares of the rent received during their minority, as well as their shares of landed property, when they should attain their respective ages of twenty-one years. *Ann* died living the testator: Held that the son *George* took all the testator's property, both real and personal, and all his estate and interest therein.

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orchards thereunto belonging, then in the occupation of *J. Tilley*, and also that plot of new inclosed ground lying in the same field, whereon the same buildings then stood, and containing eighty acres, eight perches, then divided into several closes, and also all those several other closes lying in the same field, being part of an allotment to the testator on the late inclosure of the open fields of *Bitteswell*, and which, together with the other part thereof then in the occupation of *J. Hawkins*, contained 105 acres, 2 roods, 31 perches, all which premises were then in the occupation of *J. Tilley*: he devised the same to *J. Gaunt*, *T. Paces*, and *J. Pain*, and their heirs, to the use and intent that *Mrs. Forster* might, during her life, receive thereout one annuity of 30*l.*, (payable as therein mentioned, with a power of entry and distress, &c.) and so subjected and charged, to the use of the testator's son *Thomas Grace* for his life, and after his decease to the use of all the children of the body of his said son lawfully issuing (but exclusive of his eldest son, in case of there being two or more such children besides him), their heirs and assigns for ever, as tenants in common, and not as joint tenants; but in case his said son should depart this life without leaving any lawfully begotten child or children, or issue of any such child or children, then, after his decease, to the use of the testator's daughters, *Ann Smith* and *Mary Smith*, and their heirs, as tenants in common. The testator died on 8th *July* 1795, without altering or revoking his will, leaving his son *Thomas Grace Smith* and five daughters surviving him. *T. G. Smith*, immediately after the death of the testator, entered upon the estate at *Bitteswell*, in the occupation of *J. Tilley*, and received the rents thereof to the time of his death. In his lifetime he suffered a recovery of the estate at *Bitteswell*, so in the occupation of *J. Tilley*, to the use of himself in fee; and afterwards, on 19th *October*, 1800, by his will duly executed and attested to pass real estate, devised his estate at *Enderby* to be sold for the benefit of his creditors: if it was not sufficient, his will was, that his executrix should borrow so much as was necessary to satisfy all demands, and repay it out of the money arising from rents received during the minority of his two children *George* and *Ann Smith*. His will was, that his sister *Mary Athorpe* should receive 200*l.* out of the aforesaid rents, in consequence of the trouble he hoped she would take in the education of his children. He empowered his executrix to borrow upon mortgage, if she should not have enough
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without, sufficient money to buy his son *George Smith* a cornetcy of horse: he bequeathed all his property, both real and personal, to be divided equally between his two children, allowing that his son *George Smith* should take, as a part of his share, the testator's farm at *Bitteswell*, in the occupation of *J. Tilley*, excepting the testator's house and the land which he bought of his father's trustees at *Bitteswell*, [the word "which" had here intervened, but it was cancelled, and over it were interlined the words "together with the furniture thereof;"] he left to them in common, and to the longest liver, in fee-simple: furthermore, his will was, that his children *Ann* and *George Smith* should be put into their respective shares of the rent received during their minority, as well as their shares of landed property, when they should attain their respective ages of twenty-one years. The house and the land which *Thomas Grace Smith* bought of his father's trustees at *Bitteswell*, were no part of the property in the occupation of *J. Tilley*. *T. G. Smith* died on 15th *January*, 1812, without altering or revoking his will. *Ann* his daughter died in his life-time, under the age of twenty-one years, and she and her brother *George Smith*, who is now living, were illegitimate children of the testator, *T. G. Smith*, who died a bachelor. The questions were, 1. What estate the testator *T. G. Smith* had at the time of making his will, and his death, in such part of the *Bitteswell* estate, therein described to be in occupation of *J. Tilley*, as was not purchased by him of his father's trustees? 2. What estate or interest the Plaintiff *G. Smith* took in the whole, or in any, and what part, of the real and personal estate of *T. G. Smith* under his will?

This case was twice argued, first, in *Michaelmas* term 1815, by *Copley*, Serjt., for the Plaintiff, and *Vaughan*, Serjt., for the Defendant, and again in *Easter* term 1816, by *Lens*, Serjt., for the Plaintiff, and *Shepherd*, Solicitor-General, for the Defendant.

Arguments for the Plaintiff. *T. G. Smith* took an estate for life, with a contingent remainder over to his younger children, as tenants in common, in fee, with another contingency in favour of the two daughters of the testator, which did not take place. This double concurrent contingency has been called a contingency with a double aspect. By suffering a recovery, *T. G. Smith* destroyed the contingent remainders. If so, he had a power of disposing by will, and the estate passed to the Plaintiff *G. Smith*,

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by his devise to his two children as tenants in common, with benefit of survivorship to the longest liver. The principle is stated by Lord *Hale* in *Purefoy v. Rogers* (a); "where a *contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall not be construed as an executory devise, but a contingent remainder only." It is only for necessity, that a disposition of this kind is held to be an executory devise, when it does not fall within the usual rules of limitations of real property. The case of *Goodright v. Dunham* (b) is extremely similar to this; the argument of the Plaintiff's counsel adopted by the Court there was, "that if the first remainder be contingent, the remainder over must be contingent also, for there cannot be a vested remainder after a contingent remainder in fee: for by the first contingent remainder, the whole estate is gone." *Loddington v. Kyme* (c) was cited, as hardly distinguishable from that case. These fees, it was said, were not like one fee mounted on another, but either one of them was to take effect. It was observed, that if the son took an estate tail, it would do as well for the Defendant, for then the entail would be barred by the recovery; so is it here. *Doc, Lessee of Brown, v. Holmes* (d), was also cited as applicable. There the testator devised to his son for life, remainder to the heirs male or female lawfully to be begotten of the body of his said son. In *Goodright v. Dunham*, it was not argued that it was an executory devise, but it was attempted to cut down the word heirs to an estate tail, construing it as heirs of the body. But Lord *Mansfield* says, "none of us have a doubt but that both are contingent remainders." This case has been followed in *Doe, d. Gillman, v. Elvy* (e), *Doc v. Burnsall* (f), *Denn, on Demise of Webb, v. Pucky* (g), *Doc, on Demise of Comberbach, v. Perrin* (h), *Ives v. Legg* (i), which are all founded on *Goodright v. Dunham*, and *Loddington v. Kyme*. In all of them the Court proceeds on the principle above laid down. The only question is, whether there are in this case any distinguishing words; if there be, they must be the words, "issue of any such child or children." It will probably be contended that it is to be construed as an estate tail to the children of *T. G. Smith*, and that if so, the remainder to the daughters is a vested remainder, and not barred by a recovery. For if an estate be given to a man and his heirs generally,

(a) 2 *Saund.* 388. (d) 2 *Bl.* 777. and 3 *Wils.* 237. and 241. (f) 6 *Term Rep.* 30.(b) *Doug.* 264. (e) 4 *East*, 313.(g) 5 *Term Rep.* 299.(c) 1 *Salk.* 224. S. C. 3 *Lev.* 431.(h) 3 *Term Rep.* 48.(i) 3 *Term Rep.* 488. n.

and

and there be a limitation over in case he die without issue of his body, that reduces the heirs general to mean heirs of his body. It is a question, whether this devise does not mean heirs living at the decease of *T. G. Smith*. If the language were, "in case my son shall die without leaving behind him any child or children, or issue of any child or children, and had stopped there, it might mean, living at his decease, and fall within the case of *Porter v. Bradley* (a), where the words "behind him" made the distinction: *Keilly v. Fowler* (b), and *Roe, on Decise of Sheers, v. Jeffery* (c). All hold, that where any trifling circumstance aids that construction, the meaning may be confined to a dying without issue living at the death of the tenant for life. *Fairfax v. Heron* (d), is the first case in which the word "leave" without more, confines the failure of issue to the time of the decease of tenant for life. Here, in like manner, the limitation over, is to take effect from and after the decease of the tenant for life. Lord Mansfield says, the word heirs cannot have two meanings in different parts of the same will: that is too strong a proposition; but the same word shall not have two different meanings in the same instrument without a necessity. Here the defendant's construction calls on the Court to give two different interpretations to the word issue, to support it. If the Court should deem that there is any estate tail in this case, the Plaintiff is in a condition to contend that *T. G. Smith* took an estate tail, in order to carry into effect the testator's general intent; for if not, the portion of either of the tenants in common dying, would go over to a stranger from the other children of *T. G. Smith*: the intent, however, is clear that no part of it should go over, while any issue of *T. G. Smith* remain: the general intent must prevail, though the particular intent be thereby defeated. *Doe, d. Cock, v. Cooper* (e), *Robinson v. Robinson* (f), *Doe v. Applin* (g), *Doe v. Smith* (h), are in point. It is so in all cases where there are tenants in common with remainder over, and without cross remainders. The Courts have said, we cannot imply cross remainders between more than two, and there may be more than two issue; therefore an estate tail must be given to the father. In *Doe v. Cooper*, the words from which it was attempted to imply cross-remainders were the same as here, and the argument did not prevail. In *Doe v. Abey* (i), there was an instance of an

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(a) 3 Term Rep. 143.

(d) Prec. in Chan. 67.

(g) 4 Term Rep. 82.

(b) Wilmot, 298.

(e) 1 East, 229.

(h) 7 Term Rep. 531.

(c) 7 Term Rep. 589.

(f) 1 Burr. 38.

(i) 1 Maule & Selw. 428.

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1816. estate in common, with benefit of survivorship. In *Furze v. Weeks* (a), it was held a joint tenancy. Therefore, *T. G. Smith* either took an estate for life with contingent remainders over, which he might bar, or an estate tail, which also he might bar by his recovery. As to the second will, there can be no authorities on it. It is all rendered intelligible by putting in a parenthesis the words "excepting the house and land which I bought of my father's trustees at *Bitteswell*, together with the furniture thereof."

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For the Defendant it was argued, that *T. G. Smith* took only an estate for life, and that there was a remainder in tail, expectant on his decease, to all his children except the eldest son (supposing there should be two or more besides him), as tenants in common, with cross remainders, with a vested remainder in fee to the daughters; and if so, the recovery suffered by *T. G. Smith*, the tenant for life, would be inoperative to cut off the entail. No one could purposely have worded the will more directly, to prevent the first taker from taking more than a life estate, First, it is devised to him for life. There are many instances where that estate is enlarged, but here, if the first taker's estate were enlarged, there are three clear intents frustrated. 1. The eldest son would be let in as heir in tail, whom the testator has excluded by express words. In addition there is the circumstance of a tenancy in common. The doctrine of seeing a fancied general intent to control the particular intent, has been carried much too far. In *Southby v. Stonehouse* (b), a will, made by a feme covert with power to appoint, devised "to my husband for life the profits of my estate at *B. and C.*, and after the death of my husband, I give my said estates to my children, if I should leave any, to survive me, but in case I should leave no such child or children, nor the issue of such child or children, and after the decease of my dear husband, I give the said estates to *J. Hutton*, making him hereby sole heir of this my will." The question was, whether the children took a fee, or whether there was an estate tail with a vested remainder in fee to *Hutton*. It was held clear by both sides, that "my said estates" were sufficient to carry the fee. She left a child who survived her, and died an infant. It was insisted on for the Plaintiff (the heir at law of the appointor), that the child took an estate tail, but that the fee did not pass either to the heir, or to *Hutton*. The uncle insisted that the infant took an estate in fee, as under a devise

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(a) 2 Ro. Abr. 90. pl. 5.

(b) 2 Ves. 611.

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of a fee with a double aspect, according to *Loddington v. Kymc.* Lord *Hardwicke* was clear that the child took an estate tail by this, though an imperfect will; he cites *Forth v. Chapman* (a). Lord *Hardwicke*, there too, considered whether the children would take joint estates, and he says, if they took a fee, they must have taken as joint-tenants, and he states the difficulties attendant on such a construction. It is part of the Plaintiff's argument for an estate tail to the father, that if estates tail are given to the children, and the remainder over is limited only on the decease of all the children without issue, if there be three or more, and one dies without issue, nothing in the will gives it over to the other children, nor yet to the daughters, who are to take only on failure of all the son's children. If the children of *T. G. Smith* take as joint-tenants, it removes that difficulty, for the survivor would take the whole, and it is provided how the parts of those who die shall be disposed of. If this be a contingent fee to the children, it cannot be argued for a moment that there can be a vested remainder over. The rule against implying cross remainders between more than two has been long since relaxed, especially in the case where the limitation over is of the whole estate, which circumstance alone has been deemed sufficient to raise the presumption. Where the testator's intent is that the whole estate is to go over together, cross remainders shall be implied in the mean time. In *Doc, Lessee of Gorges, v. Webb* (b), it was held that wherever an intent was to be collected, that there should be cross remainders, though not said in express words it should be so. And in *Doe v. Burnisall*, Lord *Kenyon* himself inclined to that doctrine, and agreed that cross remainders might be implied between more than two. No reason why they may not be implied between three or more, was ever given, except the insufficient one, that it would create confusion in calculating the shares. Here it is intended that all should go over together, and that *Ann* and *Mary Smith* were to take the whole, or none. It is objected, that the Defendant's construction uses the word issue in two senses. There is no ground for the remark: the immediate offspring of *T. G. Smith* are called children, a *designatio personis*, and all the descendants of the children are comprehended under the term issue; if a son of *T. G. Smith* were to die leaving issue, that issue would stand in *loco parentis*, and take *per stirpes*. If the estate for life to *T. G. Smith* were omitted, and supposing this were merely a

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(a) 1 P. Wms. 663.

(b) *Ante*, 1. 234.*

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devise to the child of *T. G. Smith* in fee, and afterwards over in default of issue of that child of *T. G. Smith*, it is the ordinary case of a fee, cut down to an estate-tail, by the words, "without leaving issue" of such child, after the devise to him and his heirs. The testator's object was, to give *T. G. Smith* an estate for life; to give his children and the issue of his children to the remotest posterity estates-tail, and in the event of their failure, then over to his two daughters. In this point of view it does not controvert *Loddington v. Kyme*, but falls within *Southby v. Stonehouse*, and *Doe, on Demise of Barnard, v. Reason (a)*. In the latter case it was held an estate-tail in the children, with a vested remainder in *J. H.* There the estate-tail in the children was created by the words, "in case my said niece shall die without issue of her body, then living, or in case all such issue shall die without issue:" the decision was, not that the children took a fee, but a vested remainder in tail, created by the word "issue" used afterwards: it might as well be said, that the word "issue" was used in two senses there, as children of children, and descendants of them. *Wealthy, on Demise of Manley, v. Boswell (b)*. Devise, in case my son *T. M.* happen to die before he is married, my will is that my lands shall descend equally to my two daughters and their heirs, and if they die unmarried, or there be no issue of their respective marriages, then to my nephew. It was held that the daughters took an estate-tail. So, in *Romilly v. James (c)*, which point the Court expressly decides, the estate in fee first given is narrowed down to an estate-tail. *Tenny, on Demise of Agar, v. Agar (d)*. Devise to *John Agar* and his heirs for ever, of a certain part of the estate, and of nine other closes, on condition to pay the testator's daughter, *Eliz. Agar*, 12*l. per ann.*, "and in case my son and daughter both happen to die without having any child or issue, then to my nephew *Richard Agar*:" though the estate first given to *J. Agar* was to him and his heirs, yet as the subsequent words were "in case he shall die without having any child or issue," that made it an estate-tail, not an executory devise over on a contingency with a double aspect; but a remainder. If any number of limitations be in a course of succession, (for there can be no succession after a fee,) they are all contingent remainders, and not executory devises. *Goodright v. Dunham* is in one view an authority for the Defendant; for the words were there stronger

(a) 3 *Wills*. 242.(b) *Cas. temp. Hardw.* 258.(c) *Ante*, VI. 263.(d) 12 *East*, 253.

to give *J. Laming*, than here to give *T. G. Smith*, an estate-tail, viz. "in case *J. L.* (the tenant for life) die without issue." All the cases cited, or to be found, turn on the event of the first taker, the *devisee for life, dying without issue, or without leaving issue; and wherever it is to go over on his not "leaving issue," that makes him tenant in tail, though he had before a vested estate of inheritance. In *Doe v. Burnsall* (a) there was not merely the indefinite failure of issue, there was the dying under twenty-one. Here the failure of issue, is, of any issue to the remotest posterity. This is a clear vested remainder in the daughters of the testator, who were *in esse* at the time, subject to be divested, as the sons from time to time were born. It is a criterion, that if both the limitations may vest, it cannot be a contingency with a double aspect, or concurrent remainder. No doubt, if a son of *T. G. Smith* had been born, the estate would have vested in him. Mr. *Fearne* (b) comments on the case of *Gulliver v. Wicket* (c) (which was a devise after the testator's wife's death to such child as she was then enceinte with, and the heirs of such child, but if such child should die under twenty-one years, leaving no issue of its body, the estate to go over); if the child there were never born, then the remainder over was to vest; if the child were born, then the fee was to vest in the child, but if the child were born, and died under twenty-one, both would vest, which can never be true of a contingent remainder. Mr. *Fearne* observes, that it was good as an executory devise, because it was to take effect within the time the law prescribes, if at all, and that the number of contingencies was not material, and the Court were obliged to confine those words to the time of the decease of the life in being, this, therefore, would be a good executory devise according to *Gulliver v. Wicket*. It may be good as an executory devise, though there are preceding estates capable to support it as a contingent remainder. *Doe, Lessee of Gilman, v. Elvy* is subject to the same answer as *Goodwright v. Dunham*. There *H. G.* took only an estate for life, with remainder over if *H. Gilvey*, not if the children, shall have no issue, and the distinction is taken by *Lawrence, J.* In the judgment, he points at it directly, and says the limitation over is in default of the persons themselves, and not of their heirs. The words "leaving any lawfully begotten issue," do not mean

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(a) 3 Wils. 241.

(b) *Fearne, Executory Devises*, 6, edit. 396.

(c) 1 Wils. 105.

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at any particular time, but a general and indefinite failure of issue. *Forth v. Chapman* has always been considered as a great leading case, and in *Crooke v. Devandes (a)*, it was much considered by Lord *Eldon*, Chancellor, who says he had heard it cited for years, and by Lord *Kenyon* himself, and never knew it shaken. As to the second unintelligible will, the words "property real and personal" would pass the fee to the two children as tenants in common, and if one had died after the testator's decease, the whole would have gone to the other. But not so here, although it is said that there are words here, which show, that the testator, though he has created tenants in common, has added the benefit of survivorship. *Bagwell v. Dry (b)*. The devise to *G. Smith* must be construed by taking out of the will all except that which is intended to be devised. The exception is difficult to understand: it must be excepted out of something in which it was included; the excepted part never was in the occupation of *Jos. Tilley*, therefore it could not be excepted out of the land in the occupation of *Jos. Tilley*. It could not mean any thing else, but to except it altogether out of the will: if it be read thus, that he "bequeaths all his property real and personal to his two children, provided that *Geo. Smith* take the farm at *B.* in the occupation of *J. Tilley*: I leave to them in common, and the longest liver in fee-simple;" the will is insensible: but the interpolation of the word "which" after the words "furniture thereof," makes the whole intelligible. Then the effect of it is, "one part I devise to my children, as tenants in common, the other part I devise to my children, as tenants in common, with benefit of survivorship." The testator knew what would, and what would not survive, as appears by his will. Why should he insert any exception at all, if he did not wish to give this part differently from the rest? His meaning is, "as to the house and the land which belonged to my father's trustees, I mean that the longest liver should have them by survivorship." The word "which" at first stood in the original will following the description of the house; then the testator struck out the word "which," in order to interline the words "together with the furniture thereof," but accidentally omitted to replace the word "which" after them, as he intended to do. But supposing the word "which" omitted, it is intelligible, though not good grammar. If the defendant's argument on

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(a) 9 *Ves.* 195. 203.

(b) 1 *P. Wms.* 700.

the first will is right, nothing devised by the first will pass by the second; but as to the other property devised by the second will, *G. Smith* took only one moiety of what the testator says he bought from his father's trustees.

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Arguments in reply: In *Doe v. Cooper* the words "the same premises" were held not to carry cross-remainders, and none can be implied here. But cross-remainders would not help the Defendant, for if there were four children, three sons besides the eldest, and the three die without issue, leaving the eldest, no cross-remainder to the eldest would arise, yet the estate would not go over, because there is still a child, and may be issue of a child. *Gulliver v. Wicket* does not apply (and it is stated in *Wilson* that three Judges of this Court held the contrary). It was unnecessary there to decide whether it was an executory devise or a contingent remainder; and the Judges do not affect to decide it: if any estate were given, it sufficed. These are both equally contingent remainders. One or other of them must start at the decease of *T. G. Smith*: either is equally supported by the estate for life of *T. G. Smith*. This is a perfect example of a contingency with a double aspect. *Doe v. Reason* is referred to, only for the strong terms there used, to show how clearly it was intended that there should be a general failure of issue, a studied care that it should be manifest. That therefore is not like this case, where from the solitary introduction of this word "issue" in one clause, the whole conclusion is to be built, that the estate is not to go over on the failure of the children and grandchildren at the decease of the first taker, but in failure of issue generally. The case of *Southby v. Stonehouse* is not applicable to the present case, where the Plaintiff contends that it is necessary to give an estate-tail to the first taker, because those coming after take in common. In *Southby v. Stonehouse*, the Lord Chancellor lays great stress on the inconvenience of the joint-tenancy in fee, and all his reasons turn on the inconvenience of survivorship, which do not apply here. *Wealthy v. Bosvill* does not resemble this. The Defendant's counsel in vain deny that they use the word "issue" in a double sense. If the latter words, "issue of any such child," had not been here, this would have been precisely the case of *Goodright v. Dunham*. Those words being here, if the testator meant that any issue of the children should take a fee, there is no difficulty in it. The Court will, if they can, avoid that construction which would leave one of the issue of
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T. G. Smith wholly unprovided for; namely, in case one of the children should die, living *T. G. Smith*, and leaving a child; but whatever that hardship be, that unprovided grandchild would no more take an estate-tail on the Defendant's construction, than take the fee on the Plaintiff's construction. The testator has introduced the word "issue" into the second clause only, and not into the first, and if "issue" means grandchild, whether he has used it so effectively as to enable that grandchild to take, or not, yet it will not cut down the fee before created. *Tenny v. Agar* bears no analogy to this case. It is alleged, that in all other cases the estate is to go over on the decease of the first taker without issue; here, on the decease of the children of the first taker without issue. What distinction this makes, is not intelligible: the question is, who takes the estate-tail? It is a *pretitio principii*, to say it goes over on the extinction of the issue of the first tenant in tail; the whole question is, whether they are tenants in tail or not. If it be an estate-tail, the remainder is a vested remainder, because there remains some portion of the fee to be given. The words, "leaving issue," mean an indefinite failure of issue, and then, there is no tendency in tail, and the contingent remainders are destroyed; but if it be a tendency in tail, it is barred by the recovery. As to the will of *T. G. Smith*, it may be inferred from the testator's striking out the word "which," that it ought not to be there, and was purposely cancelled; and the argument is stronger for its absence, than if it had never been there. It is said, there is no reason why the testator should except the house bought of his father's trustees out of the operation of his will. There may be none, there is none apparent, but the testator has done it, and the consequence is, he dies intestate as to that part. This brother and sister being illegitimate, could not succeed to each other, and therefore there was a reason why he should give them an estate in common, with a clause of survivorship. The parenthesis alone makes it intelligible. Grammar must at all events be violated. At least, it is an ill-formed sentence; but there is no case, where a word struck out by the testator, has been replaced by the Court.

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Cur. adv. vult.

The following certificate was afterwards sent to the Court of Chancery.

This case has been argued before us: we have considered it, and are of opinion,

First,

First, That the testator *Thomas Grace Smith* had, at the time of making his will, and at the time of his death, an estate for life only, in such part of the *Bitteswell* estate as was not purchased by him of his father's trustees.

Secondly, We find it very difficult to ascertain the true construction of a will so strangely worded as this will of *Thomas Grace Smith* is; but after the best consideration we could give it, we are of opinion, that the Plaintiff *George Smith* takes under the will of *Thomas Grace Smith* all his property, both real and personal, and his whole estate, and interest therein.

V. GIBBS.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

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WARD v. NETHERCOATE.

Nov. 6.

THE Plaintiff, in the affidavit whereon he had held the Defendant to bail, described himself as being of *Kensington*, yeoman; he sued in this cause, as he had in many others against the same Defendant, in * person, without the intervention of any attorney; after diligent enquiry made at *Kensington*, the Plaintiff could not be found resident there, and his abode was unknown to the Defendant; and a messenger, who had on some other business brought a letter from the Plaintiff to the Defendant's attorney, and on whom the latter then served notice of justification of bail, had refused to disclose the Plaintiff's residence; under these circumstances, on the motion of *Vaughan*, Serjt., for the Defendant, the Court granted a rule *nisi*, that the putting up in the prothonotary's office a notice of allowance of bail, should be good service, and ordered that in the mean time proceedings should be staid, and that the putting up notice of this rule in the prothonotary's office should be good service thereof.

Where a Plaintiff sued in person, and his residence was unknown to the Defendant, and his servant refused to disclose it, the Court ordered that the affixing a notice of allowance of bail, and notice of this rule, in the prothonotary's office, should be good service.

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LEWIS, one, &c. v. SHELLEY.

Nov. 7.

THE Plaintiff was an attorney residing in the country: he sued by attachment of privilege returnable in *Trinity term*

Where an attorney has waived his privilege to sue

in *Middlesex*, by laying the venue in another county, he cannot avail himself of his privilege to amend by changing the venue to *Middlesex*.

last,

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v.

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last, and instructed his agent to lay the venue in *Middlesex*. The agent, however, laid the venue in *Kent*, in which county the Defendant and witnesses lived, and the transaction arose. The Defendant did not plead until the 27th *July*, when it was too late for trying the cause at the *Kent* summer assizes 1816.

Vaughan, Serjt, now moved to amend the declaration by changing the venue to *Middlesex*, observing, that it could not prejudice the Defendant in point of time, for a trial in *Middlesex* could be sooner had than in *Kent*: it was also a sufficient reason, that the Plaintiff wished to avail himself of his privilege by suing in the Court where he was supposed to be always present. To shew that the amendment might be made in this stage of the cause, he cited *Cooke v. Shone, Barnes*.

Per Curiam. The Plaintiff has waved his privilege, which may be called an odious privilege (not speaking with reference to this particular instance), in regard to the Defendant, and has laid his action in that county, where, in respect to the Defendant, it ought to be laid; and we think, that as he has once waved it, there is no ground for bringing the venue back.

Rule refused.

Nov. 7.

ROGERS and Another v. JAMES.

A commission of bankrupt may be supported on a debt due to the petitioning creditor in the character of executor, although he have not obtained a probate on a sufficient stamp at the time when the commission issued, if he afterwards obtains a valid probate, for that has relation back to the testator's death.

THIS was an action brought by the assignees of a bankrupt to recover certain property, and on the trial of the cause at the *Winchester* summer assizes, 1816, before *Park, J.* the Plaintiffs, in order to support their title, gave evidence of a commission of bankrupt which had issued on the petition of the Plaintiff *Rogers*, founded on a debt which had been due to Mrs. *Rogers* deceased, in her lifetime, and to which he made title, as her executor; but the only probate of her will which he had sued out before the commission issued, bore a stamp denoting an insufficient duty for the value * of the effects of the testatrix; and when the Plaintiffs had in a former action sued the same Defendant for the present demand, they had been nonsuited on account of the insufficiency of the duty denoted by the stamp on the probate, which disabled the Plaintiffs from giving the probate in evidence. The Plaintiff *Rogers* had now obtained a stamp to be affixed to the probate, denoting a larger and sufficient duty, which he had since paid; but *Pell*, Serjt., for the Defendant,

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pendant, objected, that inasmuch as the Plaintiff *Rogers* had not that available probate when he sued out the commission of bankrupt upon his oath of the debt then due to him as executor, he had not such a debt then due to him, as would support the commission; and that the Plaintiffs must therefore be nonsuited. *Park, J.* was of opinion, that the right being vested in the executor by the will of the testatrix, the valid probate, when obtained, had relation back, and shewed that such a debt was due to the plaintiff *Rogers* at the time the commission issued, and the plaintiffs obtained a verdict.

Pell now moved to set aside the verdict and enter a nonsuit, or have a new trial, upon the same objection, contending that this was not like the ordinary case of an action commenced by an executor before probate, wherein if probate be obtained pending the cause, it suffices: for he argued, that if it had been made known to the Lord Chancellor before the commission issued, that the petitioning creditor derived his right to the debt through a probate which had an insufficient stamp, he would never have permitted the commission to issue; and if the same fact had been disclosed to the Lord Chancellor after the commission had issued, he would have superseded the commission. He admitted he had found no decided case in point, but the principle of the bankrupt laws required that a petitioning creditor should be fully and completely invested with all his legal rights, before any commission could properly issue on his petition.

The Court unanimously were clear that the probate, after the additional stamp affixed, made the Plaintiff's title perfect by relation, and they instanced the case of deeds, which, under the late statute, and of agreements, which, at all times, if written on no stamp or an insufficient stamp were made good by affixing a stamp, or an additional stamp, without fresh execution by the party; and *Park, J.* cited *Thynne v. Protheroe (a)*, as being in point, and they

Refused the Rule.

(a) 2 Maule & Selw. 553.

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1816.

Nov. 8.

BENTON v. THORNHILL, late Sheriff of NORFOLK.

A farmer gave a bill of sale of all his farming stock to secure a debt, the agent of the vendee took possession, and resided on the farm while he converted the stock; but the vendor also continued to reside on the farm, and exercised acts of ownership over parts of the stock: Held that the debt being *bona fide* due, and the bill of sale taken with a view to recover that debt, the jury were warranted in finding the bill of sale good against a judgment creditor taking the stock in execution.

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IN trover against the Sheriff for goods, upon the trial before *Gibbs, C. J.*, at the *Norwich* summer assizes, 1816, it appeared, that *Sparrow*, a farmer, had borrowed of the Plaintiff, who was his brother-in-law, certain sums, for the balance whereof he was indebted to him in 600*l.*, and was also indebted to *Willet* in 600*l.* The Plaintiff sent his son, who had been in the habit of occasionally residing there as a guest, to *Sparrow's* house, to obtain from him a bill of sale of his farming stock, as security for the debt. *Benton* the son obtained a bill of sale of all *Sparrow's* effects, dated 26th *September*, and expressed to be in consideration of 600*l.*, but *not including this lease of his farm; and on 28th *Sept.* he took possession of all the stock. The goods could not at that time have been sold to advantage. If the goods could have been sold to advantage, there was enough property to cover both the Plaintiff's debt and *Willet's*. *Benton* the son continued to reside in *Sparrow's* house, and employed labourers to harvest and thresh out the crops, and agents to sell the corn, and he supplied the articles requisite for the maintenance of the family. *Sparrow*, however, paid the poor-rates, appealed against a rate, sold a cow and corn to creditors, and wrought with the team for them, and was credited with the value in account. He paid the blacksmith's bills up to 25th *December* for shoeing the horses, paid servants, gave orders respecting the farming business and stock on the farm, and sowed his land with wheat, and fed the horses with oats, both threshed out by his order, from the crops included in the bill of sale; and he still appeared to act as master and owner, the servants on the farm not being aware that *Benton* the son had taken possession, for he gave them orders in *Sparrow's* name. On 24th *November*, while *Benton* the son continued to reside with *Sparrow* on his farm, the Defendant entered and seized *Sparrow's* effects under an execution at the suit of *Willet*, on which occasion *Sparrow* locked the doors and refused the officer entrance into the house; and shewing him the bill of sale through a window, told him that he had provided himself against the execution, for he had taken care of his friend and set *Willet* at defiance. The Defendant insisted that this bill of sale was fraudulent, the Plaintiff not having

having had under it the entire and exclusive possession of the goods. The jury, however, found a verdict for the Plaintiff, which

* *Shepherd*, Solicitor-General, now moved to set aside, and to have a new trial; he cited *Twyne's case* (a), and *Edwards v. Harben* (b), and distinguished this case from those of *Kidd v. Rawlinson* (c), and *Dawson v. Wood* (d). But he mainly relied on *Wordall v. Smith* (e), where Lord *Ellenborough*, C. J., says, "It is a mere mockery to put in another person to take possession jointly with the former owners of the goods. A concurrent possession with the assignor is colorable: there must be an exclusive possession under the assignment, or it is fraudulent, and void as against creditors." Strangers could not know that *Benton* the son was not residing with his uncle as a visitor. The bargainee ought to have an absolute, notorious, and exclusive possession: if the vendor remains on the premises, and continues to manage the property, the vendee having merely the instrument in his pocket, the sale is nugatory and fraudulent.

GIBBS, C. J. I certainly meant at the trial to give the Defendant the benefit of all the arguments now used in his behalf. I believe that in summing up the evidence, I did give him the benefit of all those arguments. I left it to the jury, whether this possession of *Benton's* were an honest one, for that if the bill of sale to *Benton* were attended with a possession, there being a debt honestly due to *Benton*, *Sparrow* had a right to make this conveyance to *Benton* for securing his debt, and then the execution came too late, there being no bankruptcy here. I stated that the question whether the transaction were fraudulent, depended on the object of the bill of sale, and on the circumstance whether, under that bill of sale, an actual *bonâ fidé* possession was delivered to young *Benton* acting on the behalf of his father. I stated the positive oath of young *Benton*, that he was sent by his father for the bill of sale, that he did get it, and that he remained in possession under it. I also left to the jury all the circumstances which went to falsify *Benton's* evidence, *Sparrow's* acts of continuing ownership, his sowing the corn, his declarations when the officer entered, and his remaining on the farm; which last circumstance, indeed, deserved no great weight, for his term in the land was not conveyed. And I told them also

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(a) 3 Co. 80. b.

(b) 2 Term Rep. 587.

(c) 2 Bos. & Pull. 59.

(d) Ante, III. 256.

(e) 1 Campb. 332. .

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this, that even if there was a *bonâ fidé* debt, due from *Sparrow* to the Plaintiff, yet if they thought, that, beyond that debt, the conveyance was meant to colour and protect the residue of the property from *Sparrow's* other creditors, it was void for the excess. I also pointed out, that the value of the property, particularly at that time, was a fluctuating one, and that if it was the intention of the parties merely to provide for the debt to *Benton*, the verdict must be found for the Defendant. The jury have come to a conclusion on these facts, and if I were to sum up the evidence to them again, I could not sum it up otherwise than I have done.

DALLAS, J. This is moved upon the ground that the verdict was given against the weight of evidence, but I think the verdict is even consistent with all the evidence.

PARK, J. concurred.

BURROUGH, J. My Lord seems to have put the case to the jury on all the grounds on which it can be put, and there is no foundation for granting a new trial.

Rule refused.

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Nov. 8.

LEWIS v. PEAKE.

The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, and the Court will not set aside a verdict for a preponderance of contrary evidence.

If the buyer of a horse with warranty, relying thereon, resells him with warranty, and being sued thereon by his vendee, offers the defence to his vendor, who gives no directions as to the action, the Plaintiff, defending that action, is entitled to recover the costs thereof from his vendor, as part of the damage occasioned by his breach of warranty.

THIS was an action upon the warranty of a horse, in which the declaration assigned as a special damage occasioned by the breach of the warranty, that the Plaintiff, confiding in the Defendant's warranty, resold the horse with warranty to *Dowling*; and, the horse proving unsound, *Dowling* sued the Plaintiff, and recovered 88*l.*-costs, besides the price of the horse. It was proved that the Plaintiff gave the Defendant notice of that action, and offered him the option of defending it, to which having received no answer, he defended it himself and failed. At the *Warwick* summer assizes, 1816, before *Graham*, B., a verdict was found for the Plaintiff, for a sum which included the whole special damage averred, subject to the point reserved, which is stated below.

Vaughan, Serjt., now moved, either to set aside the verdict,

and

and have a new trial, upon the ground that the weight of the evidence tended to prove that the unsoundness did not commence until after the sale by the Defendant; or, secondly, to reduce the damages, by striking off from the sum recovered by the verdict, the amount of the costs of *Dowling's* action, which he contended that the Plaintiff was not entitled to recover from the Defendant; for that, if the horse was unsound, as the Plaintiff now contended it was, he had needlessly incurred those costs, and paid that money in his own wrong; inasmuch as he might at the beginning have discharged himself by paying to *Dowling* the mere price of the horse; and if the Plaintiff chose to rely on the Defendant's warranty, he ought so to have done.

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GIBBS, C. J. This application stands on two grounds; as to the first, there is no doubt, on the Defendant's own statement, but that there was evidence on both sides; it is like a case which was before us last term, tried before *Wood, B.*, who said that if the verdict had been the other way, he should have been better satisfied; but we held that it was a question peculiarly fit for the consideration of a jury, and we refused to interfere. As to the second question, the Plaintiff was induced by the warranty of the Defendant to warrant the horse to a purchaser: he gave notice to the Defendant of the action, and receiving no directions from the Defendant to give up the cause, he proceeded to defend, and was cast: those costs and damages are therefore a part of the damages which the Plaintiff has sustained by reason of the false warranty found against the Defendant. I therefore am of opinion that the Plaintiff was entitled to recover these damages.

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Rule refused.

 HEDBURG v. PEARSON.

Nov. 8.

THIS was an action upon a policy of insurance on the galliot *Face*, from *Gottenburg* to *Stralsund*, "warranted free from particular average," and the insurance was declared to be "on hogsheads of sugar." Upon the trial of the cause, at *Guildhall*, at the sittings after *Trinity* term, 1816, before *Gibbs, C. J.*, upon a policy on hogsheads of sugar, warranted against particular average, some part of the sugar in every hogshead being preserved, though less than three *per cent.* on the cargo, it was held that this could not be a total loss.

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it was proved that in the course of the voyage the ship was stranded and bilged, but every one of the fifty-four hogsheads of sugar which the assured had on board was saved; and in every hogshead there were some loaves of sugar, although by far the greater part had been washed out. A hogshead usually contains about 120 loaves, and out of the whole cargo, 78 loaves were saved dry, and 45 loaves wetted by the sea. The Plaintiff contended that he was entitled to recover as for a total loss, the proportion of the sugar saved being too minute to make it an average loss, and he cited *Davy v. Milford (a)*, where, notwithstanding the like warranty against particular average, the Plaintiff recovered the value of all such bales of flax as were lost, although some part of the flax was recovered from the sea and dried. The jury, however, were clearly of opinion, that this was an average loss, such as was intended by the warranty, and found a verdict generally for the Defendant, declining the learned Judge's proposal of finding for the Plaintiff, subject to a point to be reserved on the question, whether this were a total or partial loss.

Lens, Serjt., now moved to set aside the verdict and have a new trial, intimating that the jury had somewhat intemperately taken on themselves to decide the law on this point, and that the proportion of the sugar saved was so small, that this must be deemed a case of total loss, not of particular average.

But *The Court* held, that inasmuch as it could not be said, that none of the sugar was saved, they could not draw any measure of a proportion to be saved, which should be compatible with a total loss; if they should begin so to do, they could not see where they were to stop; and even if this were a fit case for the consideration of the Court, they thought the jury had rightly decided it. In *Davy v. Milford*, there was a clear line to be taken; for some of the bundles of flax never came ashore; and they refused to grant the rule.

(a) 15 *East*, 559.

1816.

TAYLOR v. SMITH.

Nov. 9.

TRESPASS, for that the Defendant on 17th *October*, 1815, stopped the Plaintiff's cattle and cart; plea, not guilty, and justification that the Plaintiff was loading his cart with turf, which he had wrongfully cut from the waste of the manor of *Clapham*, and the Defendant, as bailiff of the lord, took it from him. The Plaintiff replied to the justification, *de injuriâ suâ*, and newly assigned, that the Defendant on other days and times did the trespasses complained of; and upon the trial, before Lord *Ellenborough*, C. J., at the *Guildford* summer assizes, 1816, he proved a licence from the lord to cut the turf. Verdict for the Defendant, which *Onslow*, Scrjt., now moved to set aside, on the ground that, upon the evidence of the licence, the verdict ought to have been for the Plaintiff.

The Court held clearly, 1. That a single act only of trespass being laid, and not *diversis vicibus et diebus*, and that act being covered by the Defendant's plea of justification, there could be no new assignment. 2. That the licence, not being replied, could not be given in evidence to rebut the justification, and therefore the verdict was right; and they

Where the Plaintiff in his declaration avers a single act of trespass, which the Defendant justifies, there can be no new assignment.

Where a Defendant justifies a trespass for preventing a tortious act of the Plaintiff, if the Plaintiff relies on a licence which rendered his act lawful, he ought to reply the licence.

Refused the Rule.

HOBY v. ROEBUCK and PALMER.

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Nov. 9.

THIS was an action of *assumpsit*. Upon the trial of the cause before *Gibbs*, C. J. at the sittings after *Trinity* term, 1816, it appeared that the Plaintiff had leased for twenty-one years to *Roebuck*, who afterwards took *Palmer* into partnership in his trade, for the purposes of which the demised premises were used, but were not sufficiently large; wherefore the Defendants jointly agreed by parol with the Plaintiff, that if he would erect an additional story over the house, they would pay him, during the residue of the demised term, besides the former rent, 10 *per*

Where the lessee of a house, and his partner in trade, agreed to pay the lessor annually, during the residue of the lessee's term, 10 *per cent.* on the cost of new buildings, if the lessor would erect

them: Held, 1. That this agreement was not required by the statute of frauds to be in writing; 2. That though the partner quitted the premises, he was liable on this collateral agreement during the residue of the term.

cent.

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cent. on the cost. The building was erected, and after they had paid the increased rent for some years, *Palmer*, before the debt accrued for which this action was brought, quitted the partnership and the premises. *Lens* and *Vaughan*, Serjts., contended that *Palmer* was not liable in this action, for that this contract for an additional rent was a demise of the new buildings, and ought, according to the statute of frauds, to have been in writing. *Gibbs*, C. J. thought otherwise, for that whatsoever was built, instantly became parcel of the premises already demised; and that this was a collateral contract, to which *Palmer*, no less than *Roebuck*, was chargeable during the residue of the term; and the jury found a verdict for the Plaintiff.

Vaughan now moved for a new trial: he urged that the increased payment might be recovered by distress on the premises, as rent; *Palmer's* interest, in respect of which he was liable, was only co-extensive with his partnership with *Roebuck*.

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The Court held, that the original lease still existed: the new contract was, therefore, no demise of the premises. Only the original rent could be distrained for, and this was merely a collateral agreement to pay so much more money during the residue of the term, if the lessor would make the desired expenditure.

Rule refused.

Nov. 9.

STUART v. SMITH.

If the tenant of a house contract with a builder to rebuild a party-wall, without reference to the building-act, the builder is entitled to be paid by him, without observing the requisites for obtaining payment prescribed by that act.

THIS was an action of *assumpsit* tried at the sittings after *Trinity* term, 1816, before *Gibbs*, C. J., wherein the Plaintiff sought to recover 28*l.* for the price of the moiety of a party-wall, which the Plaintiff, who was a builder, had erected between the Defendant's house and the adjoining house. The Defendant, who was tenant of a house in *London*, had asked the Plaintiff whereabouts would be the expence of erecting it; the Plaintiff answered 28*l.* The Defendant replied, "Very well, I doubt not, I shall pay that which is right and fair." After verdict for the Plaintiff, *Vaughan*, Serjt., now moved to set it aside and enter a nonsuit, upon the ground that the requisites of the building act (*a*) which had not been observed, were not dispensed with by this retainer. If a tenant chooses to pay the

(a) 14 Geo. 3. c. 78.

expençe of a party-wall, he may do so, and deduct it from his rent; but he is not bound so to do, and therefore there was no consideration for the Defendant's promise. There ought to be a previous account left for inspection.

GIBBS, C. J. There is not the least colour for disturbing this verdict. Occupiers of two adjoining houses may agree amongst themselves, (and perhaps will act much more wisely in so doing,) to rebuild a party-wall, without having recourse to that intricate law. The Defendant has communication with the Plaintiff on the point, and applies to him to know what his share of the expence will be; he says 28*l.*; the Plaintiff says, "Very well, I doubt not I shall pay what is fair." He then permits the Plaintiff to build the wall, under the idea that the Defendant will pay him 28*l.* for it; And when it is done, and the Plaintiff applies for payment, the Defendant only says, it is not convenient for me now to pay; he says nothing about the requisites of the building act; and he cannot now set up that act. Independently of this, it was in evidence that the Defendant had offered his lease to sale, and asked 300*l.*; and it has been held that persons in cases not very dissimilar to this, are the owners of the improved rents, and therefore I am not clear that the Defendant is not legally liable to the price: but without going into this, on the other facts, there is no ground to disturb the verdict.

Rule refused.

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v.
SMITH.

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GOUPEY and Another v. HARDEN and Others.

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Nov. 11.

THIS was an action brought against the Defendants as indorsers of two bills of exchange, for 400*l.* and 500*l.*, drawn on 12th May 1815, by *De Franca* and Co. upon *Gould*, brothers, and Co. merchants at *Lisbon*, at thirty days after sight, payable to the Defendants, and *by them indorsed to the Plaintiffs, who were merchants at *Paris*, and who indorsed the bills to *Ricci* and Son, merchants at *Genoa*, who also negotiated the bills. The bills were presented to *Goulds* for acceptance, on the 22d August in the same year, when they were refused, and protested for non-acceptance; but were accepted by *Montaro*, under protest, for the honour of *Ricci* and Co.; the bills were

An agent purchasing foreign bills for his principal, and indorsing them to him, without qualification, is liable to the principal on his indorsement, however small be the commission which he gets upon the purchase.

It is no laches to put a foreign bill, payable after sight, into

circulation before acceptance, but to keep it circulating without acceptance so long as the convenience of the successive holders requires.

again,

1816.

GOUFY
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again, on 20th *September*, when due, presented to *Goulds* for payment, which was also refused, and a protest made, and *Montano* paid them for the credit of *Ricci* and Co. whereby the Plaintiffs were obliged to pay the amount of the bills, with costs, charges, interest, exchange, and re-exchange. Upon the trial of this cause, at the sittings in *London* after *Trinity* term, 1816, before *Gibbs*, C. J., it appeared that the Plaintiffs had employed the Defendants, who were merchants in *London*, for a commission of one half *per cent.*, to procure in *London*, and transmit to them to *Paris*, bills on *Portugal* for 1000*l.*: the Plaintiffs accordingly purchased upon the exchange the bills in question, and having specially indorsed them to the Plaintiffs, transmitted them to *Paris*; the Plaintiffs indorsed them to *Ricci* and Sons, merchants at *Genoa*, who further negotiated them. On the 15th of *July*, *De Franca* failed. *Goulds* had paid bills drawn on them so late as the 30th of *June* 1815. On the 12th of *Oct.* the Plaintiffs, by letter apprised the Defendants of the dishonour of the bills, and in a subsequent letter stated that they should certainly have sooner sent forward the bills for acceptance, had they not relied on the Defendants' guaranty. The Defendants contended, first, that they, having indorsed these bills to the Plaintiffs only as their agents, were not liable on that indorsement. Evidence was given that when agents indorse foreign bills for the mere purpose of transmitting them, without intending to incur responsibility for the payment, it is their practice to add to the indorsement the words "*sans recours*;" that these words however, implying a doubt in the mind of the indorser of the stability of some of the parties, injure the credit of the bills, and therefore are usually omitted, if a confidence exists between the parties, although it is nevertheless intended that the agent should not be responsible for the goodness of the bills; and the Defendants contended, that such was the course of dealing in the present instance, as evinced by the low rate of commission which the Defendants were to receive. The Defendants also contended that they were discharged by laches; for that the bills ought to have been sooner presented to the drawee for acceptance, and not sent round from *Paris* to *Italy*, by which the presentment for acceptance, and consequently the period of payment, had been many months delayed; and if the bills had been presented for acceptance in the beginning of *June*, they would have been payable before *Goulds* ceased to honour the drawers' demands, and before the drawers themselves

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themselves had become insolvent. The jury, however, found a verdict for the Plaintiffs; which

Lens, Serjt., now moved to set aside, on the grounds, first, that an agent, under these circumstances, was not liable upon his indorsement; next, that the presentment of a bill payable at, or a certain time after sight, could not be protracted to an indefinite or unreasonable period, without discharging the parties.

GIBBS, C. J. This is an action brought against the indorser of two bills at thirty days' sight: and the verdict is for the Plaintiffs. Objections are made to their right to recover, on two grounds; first, that though the bills were indorsed by the Defendants, the Defendant, under the circumstances is not liable on his indorsement. Secondly, that there has been laches, in not presenting the bills for acceptance within a shorter time. As to the first objection, here is an unqualified indorsement. It is not proved that the Plaintiffs knew that the Defendants were connected with the bill otherwise than as agents; but if they had known it, and I will take it in the strongest way, that they knew the Defendants were acting only as agents, still they had a right to consider, that in this transaction the Defendants were liable as indorsers; and they may justly say, as they have done, "We should have sent forward these bills for acceptance, unless we had seen your names on them, which placed the respectability of the bills beyond a question, otherwise we should have sought the security of the drawee." But this leaves the second objection untouched. If these bills had been locked up, and not sent into circulation, the case would have been widely different. I know *dicta* may be found, that a bill payable at sight must be presented within a reasonable time; but this very question occurred in this Court in the case of *Muilman v. De Eguino* (a), bills were sent out to *India*, and one question was, whether they were presented for acceptance within a reasonable time in *India*, and it was held that they were; but the main question was, whether they were delayed too long in *Europe*, before they were sent out. Upon the last point, *Eyre*, C. J., says, "there would be a great difficulty in saying at what time such a bill should be presented for acceptance. The Courts have been very cautious, in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance; and it seems to me more necessary to be cautious with respect to a foreign bill payable in that manner. I do not see how the Courts can lay down any precise

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(a) 2 H. Bl. 565.

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rule on the subject." *Heath, J.*, says, "no rule can be laid down as to the time for presenting bills drawn payable at sight or a given time after." The jury have found, that these bills were presented in a reasonable time, but the law prescribes only, that they must be presented at some time. *Buller, J.*, is still stronger and lays down the rule, only that the bill must be put into circulation. In the present instance, these bills were put into circulation, and they passed through *Paris* and *Genoa*. He proceeds to say, "If they are circulated, the parties are known to the world, and their credit is looked to, and if a bill drawn at three days' sight were kept out in that way for a year, I cannot say there would be laches. But if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches." I am therefore clearly of opinion, that the parties were not guilty of laches in putting this bill into circulation, before it was presented for acceptance.

DALLAS, J. The Defendants might have specially indorsed this bill *sans recours*, if they had thought fit so to do, but they have not done it.

The rest of the Court concurred in refusing the application.

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 Nov. 11.

LUCAS and Others, Assignees of DOORMAN, a Bankrupt, v. GRONING.

A. consigned goods for sale to a house in *Hamburgh*, in which the Defendant was partner, and the Defendant made advances of money in *London* to *A.*, to be repaid out of the proceeds of the sales. The house at *Hamburgh* purchased with the proceeds bills on *London*; they specially indorsed and remitted them to the Defendant here, and advised *A.* that they were bought for his account, and debited him therewith. The bills being dishonoured, a jury found that the consignees were not authorized to purchase bills for the account and risk of *A.*: and the Court held the verdict to be right.

THIS was an action of *assumpsit* for not accounting, and not paying over the proceeds of sugars consigned for sale on commission. It was tried before *Gibbs, C. J.* at *Guildhall*, at the sittings after *Trinity* term, 1816, when it appeared, principally by admissions, that *Doorman* agreed to consign goods to *R. Groning* and Co. at *Hamburgh*, in which house the Defendant was a partner, for sale upon a commission *del credere*, and the Defendant agreed to make advances in *London*, where he resided, to *Doorman*, to be repaid out of the proceeds of those consignments. *Doorman* had consequently shipped sugars to *R. Groning* and Co., which had been sold at *Ham-*

The jury may properly judge of the meaning of mercantile phrases in the letters of merchants.

burgh,

burgh, and produced 16,447*l.* 19*s.* 4*d.* By letter of 16th December, 1814, *R. Groning* and Co. advised *Doorman* of the sale of certain sugar, and added, that their exchange had given way a little again that day, and they had availed themselves of the opportunity, to buy some paper, which they that day remitted, for his account, to the Defendant, viz. 1000*l.*, for which they debited *Doorman*, and requested him to note the same in conformity. On the 20th December they again advised *Doorman*, that they had availed themselves of the decline in their exchange that day, to purchase some bills for his account, which they had remitted to the Defendant, viz. 2964*l.* 5*s.* 5*d.*, and debited *Doorman* for the same, which they requested him to note accordingly. On 27th December, *Groning* and Co. advised *Doorman*, that the correct amount of the bills remitted on the 20th was not 2964*l.* 5*s.* 5*d.*, but 3000*l.*, for which they requested he would "please to give them credit in exchange when the bills were duly honoured." Among the bills remitted on the 20th were bills for 1600*l.*, drawn by *Leman* on *Levy* and Co. of *London*, which *R. Groning* and Co. had purchased with the proceeds of *Doorman's* sugar; *Leman* had indorsed them to *R. Groning* and Co., and they indorsed them to *R. Groning*, or order, in *London*, value in account. These bills, although in due course accepted in *London*, were not paid at maturity, *Levy* having in the mean time stopped payment, and *Doorman* had due notice of the dishonour. The advances made by the Defendant to *Doorman* had been repaid out of the proceeds of the sugars consigned by *Doorman* to *Groning* and Co. for sale, and the whole of the balance of such proceeds had been duly accounted for to *Doorman*, except those bills for 1600*l.*, and whether that sum had or had not been accounted for, depended on the question, Whether those bills were remitted upon the account and at the risk of *Doorman*, or of *R. Groning* and Co.? At the time when those bills arrived, the Defendant was in advance to *Groning* 900*l.* Since those bills were remitted, *Doorman* had failed, and the Plaintiffs were his assignees. *Gibbs*, C. J., thought that *R. Groning* and Co. were not entitled, without a special authority, which was not shown to exist, to buy and remit bills at the risk and for the account of *Doorman*; but he left the question to the jury, with an intimation that the expression that these bills were purchased on the Plaintiff's account, did not bind him. The circumstance of their being bought on his account did not make them a good payment

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payment to him, unless the bills were productive, and that expression in the third letter, that *Doorman* would please to give them credit in exchange when the bills were duly honoured, implied that *Groning* and Co. were not to take credit for them, unless duly honoured, and that if dishonoured, they were to be of no weight in the account. Besides, they had no right to load the Plaintiff with the risk of these bills; for as soon as they received the money for the sugars in *Hamburgh*, they were debtors to the Plaintiffs, and they had a partner here, who might pay them; further than that, they never indorsed the bills to the bankrupt; they indorsed them to the Defendant their partner resident here. The Chief Justice thought, they ought either to be indorsed directly to the bankrupt, or at least, if they indorsed the bills to the Defendant merely for the purpose of conveyance, they ought to have been instantly indorsed over by him to the bankrupt, which was not the case. The jury observed, that the Defendant, by his mode of treating the remitted bills, had made them his own, and they found a verdict for the Plaintiffs for 1600*l*.

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Shepherd, Solicitor-General, now moved to set aside the verdict, and have a new trial, that he might be permitted then to give evidence of the course of the previous dealings of the parties before the letter of the 16th of *December*, 1815, which, as he was instructed, would show that the bankrupt had sanctioned the remittance of the proceeds of former transactions, when made by the purchase of bills for his account, in the same way; and that *R. Groning* and Co. were in the habit of purchasing bills in *Hamburgh* for the bankrupt, when they could be advantageously bought. Stress had been laid on the term in the last letter, requesting to have credit for the bills, when duly honoured: the phrase, when applied to a bill purchased abroad, and remitted to this country, meant not payment, as it would in the case of a bill purchased after acceptance, but that honour which an acceptor gives it, by coming under that responsibility. The agreement was not, that *Doorman* should receive the remittances, and pay the Defendant out of them, but they were to go through the Defendant's hands, that he might pay himself out of them as they passed. The proceeds were therefore necessarily to be remitted specifically by *R. Groning* to the Defendant: he was the person who was to get the bill accepted by *Levy*, to receive the money of *Levy*, and thereout to recompense himself for his advances. Therefore it makes no difference

ence in the case, that the Defendant in *London* was the partner in the house of *Groning* and Co. If this had been a mere remittance from one partner to another, there was no occasion for *R. Groning* and Co. to have advised *Doorman* of their remittances. They would only have informed the Defendant, that they had sold the goods, that they owed the proceeds to *Doorman*, and that they sent the Defendant the money that he might pay him. He offered an affidavit by the Defendant, that *R. Groning* and Co. had on former occasions purchased bills, and advised the bankrupt that they were bought for his account, and that there was no evidence of his dissent before his bankruptcy.

GIBBS, C. J. This was a question singularly fit for a jury, and one on which they were likely to arrive at a sounder conclusion than the Court, because their knowledge of it arises from their daily experience. The question is, whether this was a remittance made in this form by *Doorman's* own order, or was a remittance by *R. Groning* and Co. abroad, to the Defendant here, out of which he was to retain his advances, and pay over the balance. The expressions in the several letters from *R. Groning* and Co. are not easily reconcileable; but the question, whether the phrase "when duly honoured" means when they were accepted, or when they were paid, was a question not so much for the consideration of the Court as of a jury. The jury have pronounced their judgement: and, on a case involved in much mercantile obscurity, they have formed the opinion, that the bills were remitted at the risk of *R. Groning* and Co., not of *Doorman*. Under these circumstances, I think there ought to be no new trial; and as to the affidavit now offered, of the former course of dealing, in this stage of the cause it cannot possibly be received.

DALLAS, J. I am of the same opinion. This was a case peculiarly fit for the jury, and one of them, as I caught the expression, says that the Defendant *Groning*, by his treatment of the bill, had made it his own. There is, therefore, not enough doubt in my mind to make me think it fit to send the cause to a new trial.

PARK, J. The Solicitor-General argues that the phrase "duly honoured" means accepted; whether it does so or not, has been left to the jury, and they have found that it meant due payment; which is the opinion I should myself have formed. With respect to the argument drawn from the case hypothetically

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hypothetically put, that the proceeds might have been sent home in produce, the Defendants could not, without a special authority, have invested them in produce, nor could they, without the like authority, invest the proceeds in bills.

BURROUGH, J. An ordinary man would see from this expression, "when the bills are honoured," that the amount is to be put to the credit of the *Gronings*, when the bills were paid, not when they were accepted. Therefore I think the verdict right.

Rule refused.

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LITT and Another v. COWLEY and Others.

Nov. 11.

If a carrier, after notice from the vendor of goods to stop them *in transitu*, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee.

And though, the vendee having become a bankrupt, the goods have passed into the hands of his assignees, yet, inasmuch as they did not come to the possession of the bankrupt with the consent of the true owner, they are not in the order and disposition of the bankrupt within the statute 21 Jac. 1. c. 19.

s. 11.

THIS was an action of trover for a bale of *Manchester* goods. Upon the trial of the cause at *Guildhall*, at the sittings after *Trinity* term 1816, it appeared that the Plaintiffs, pursuant to an order, had on the 9th *December* delivered the goods to *Pickfords*, carriers at *Manchester*, to be brought by a canal to *London*, addressed to *Neale* and *Warner*. Afterwards, seeing cause to stop them *in transitu*, they gave notice to the carriers to deliver them not to *Neale* and *Warner*, but to an agent of the Plaintiffs' own; but the carriers, in consequence of an accidental mistake of a clerk, nevertheless delivered them, on 23d *December*, to *Neale* and *Warner*, and debited them with the freight, who unpacked them, and sold a part. On 19th *January* following a commission of bankrupt issued against *Neale* and *Warner*; and the Defendants, who were their assignees, and had taken possession of the goods, refused, on demand made on 3d *February*, to restore them to the Plaintiffs. The jury, under the direction of *Gibbs*, C. J., found a verdict for the Plaintiffs.

Best, Serjt., now moved to set it aside: First, this case went further than any case had yet gone. Though goods might be stopped on their passage, yet if the attempt to stop them fails, and they do pursue their original destination, the property in the purchaser is complete, and cannot be revested. The Plaintiffs might possibly maintain an action against the carriers for wrongfully delivering them, but the property in the specific goods is changed. Secondly, the Plaintiffs could not recover, because these goods were actually in the possession, order, and disposition of the bankrupt at the time of the bankruptcy, and therefore fell into the mass of his property for the benefit of the creditors.

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GIBBS, C. J. This turns on the shortest possible point. These goods were sent by *Pickfords'* boats, by the canal, addressed to *Neale* and *Warner* in *London*: this is an action brought by the seller against the assignees of the buyer, to recover them back. Notice to stop the goods *in transitu* was given by the seller to *Pickfords*: that notice was perfect; it was given at the place whence the carriers' boats sail; and *Pickfords* in the country write to *Pickfords* in *London*, to retain the goods, substituting the names of *Birkett* and *Schofield* for those of *Neale* and *Warner*. *Pickfords'* goods come to *Paddington*, and their instructions come to their counting-house in the city. They sent to their servants at *Paddington* to stop the goods: but by a mistake originating in a mere misunderstanding of the name at the counting-house, the goods are delivered by their servant to the purchaser. It was formerly held, that the only way of stoppage *in transitu* was by actual corporal touch of the goods. It has since been held that after notice to a carrier not to deliver, he is liable for the goods in trover against himself, if he does deliver them. It is clear, therefore, that after this notice, *Pickfords*, delivering them to *Neale* and *Warner*, are liable in trover for the goods, and I thought it monstrous to say, that their delivery of them by mistake, under such a liability, would confirm the property in the bankrupt. The law of stoppage, *in transitu* says, that the property, which was before in the bankrupts, may be revested in the seller by notice to the carrier. The Plaintiffs give that notice to the carrier and thereby revest the property. Before such notice to the carrier to stop the goods, the purchaser may bring trover for them; after such notice, the seller may bring trover. A vendor could not maintain trover against a carrier, unless he could revest the property in himself, and if he can revest it, then the subsequent delivery by mistake will not perfect the sale.

DALLAS and PARK, Js., were of the same opinion.

BURROUGH, J. There is not an order and disposition of the bankrupt within the statute of 21 Jac. 1., unless the goods are in his possession, with the consent of the true owner, which in this case they are not. The countermand of the order to deliver, revests the property in the vendor.

Rule refused.

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Nov. 18. (a)

MACHU v. FRASER (a).

An affidavit to hold to bail the acceptor of a bill of exchange, not shewing that the bill is become payable and that it continues unpaid, is bad.

Whether an affidavit to hold to bail on a bill of exchange need show the Plaintiff's relation to the bill, *quære*.

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THIS Defendant was arrested upon an affidavit that he was justly and truly indebted to the Plaintiff in 18*l.* and upwards, on the balance of accounts, for goods sold and delivered by the Deponent to the Defendant, and upon two bills of exchange, viz. one for 29*l.* 14*s.* 6*d.*, drawn by the Defendant upon and accepted by *John Thomas*, and the other for 27*l.* 1*s.* drawn by the Deponent upon, and accepted by the Defendant.

Copley, Serjt. on a former day in this term, upon the ground that the relation of the Plaintiff to the first bill did not appear, and on the authority of *Balbi v. Batley* (b), and on the ground that it did not appear *that the second bill, to which the relation of both parties was shewn, had become due, or remained unpaid, had obtained a rule *nisi* for delivering up the bail-bond to be cancelled, upon entering a common appearance.

Best, Serjt., shewed cause. It is sufficient that the Defendant's relation to both bills appears. *Bradshaw v. Saddington* (c). He is sworn to be acceptor of the one, and drawer of the other. As to the objection, that it is not shewn that the bill is payable, and unpaid, this is distinguishable from *Jackson v. Yate* (d), because, though the maker of a note instantly contracts a debitum *in præsentî*, *solvendum in futuro*, yet the drawer of a bill, which is the first part of this case, is not indebted until the bill be dishonoured, either by non-acceptance or non-payment; and therefore an affidavit that he is indebted, must by intendment, comprehend the allegation that the bill is become payable, and also that it continues unpaid. And with respect to the second bill, no affidavit to hold to bail ever yet stated all the special circumstances which create the debt; and *Jackson v. Yate* being only the decision of a single judge, is of less authority than *Davison v. March* (e), according to which, it is sufficient to swear to the conclusion, that he is indebted to the Plaintiff, as indorsee (f) of a bill of

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(a) On this and the following day, *Burrough J.*, was absent, sitting on a special commission at the Admiralty Sessions at the *Old Bailey*.

(b) *Ante*, VI. 25.

(d) 7 *East*, 94.

(c) 2 *Maul & Selw.* 148.

(e) 1 *New Rep.* 157.

(f) The Court, in observing on *Jackson v. Yate*, where the Defendant was sworn to be indebted to the Plaintiff in 450*l.* as indorsee of a promissory note, considered that the word "indorsee" was a mistake, for indorser; but in *Davison v. March* the exchange,

exchange, without alleging that the bill is become due, for if the bill be not due, he may be indicted for perjury. He prayed that the Plaintiff might file a supplemental affidavit.

Copley, in support of his rule, relied on *Balbi v. Batley* as the latest decision, ruling that it was necessary to show the plaintiff's relation to the bill: and on *Jackson v. Yate*, as overruling *Davison v. March*, and deciding that it was necessary to show that the bills were payable and unpaid. The acceptor of a bill in this case was analogous to the maker of a note in that, and must observe the same requisites.

GIBBS, C. J. It is unnecessary to decide whether the affidavit ought to state the relation of the plaintiff to the bill; but the case last decided in this Court is certainly much broken in upon by the last case decided in the Court of King's Bench, which, as Mr. *Marshall* has well remarked (*a*), was not cited upon the discussion of *Balbi v. Batley*. This Court certainly intended to make the practice of the two Courts uniform, and decided according to that, which the discovery of this case of *Bradshaw v. Saddington* shows not to be the uniform practice of the Court of King's Bench. The other point is this: the plaintiff swears the defendant is indebted on a bill drawn by the plaintiff upon, and accepted by the defendant. Every word of this may be true, and yet the plaintiff may not be entitled to arrest the defendant, and if so, certainly it is not such an affidavit as can support this arrest,

DALLAS, J. concurred.

PARK J. This case is distinguishable from *Davison v. March*, on the ground on which it is put in *Jackson v. Yate*, that an acceptance being like a promissory note, a *debitum in presenti, solvendum in futuro*, the plaintiff may truly swear that the defendant is, in a manner, indebted, and yet he may have no right to arrest.

The Court adhered to their invariable practice in refusing *Best's* prayer for permission to file a supplemental affidavit.

Rule absolute.

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same form occurs; and it appears to be the ordinary phrase used on these occasions, and is correct in sense, as well as in grammatical construction, being put in apposition with the last substantive in the preceding clause, "indebted to this deponent," which clause is found in the affidavit, though, as it is abbreviated by the reporter, the antecedent being omitted, the sense is obscured; but "indorse" is there descriptive of the relation of the Plaintiff to the bill, and not of the relation of the Defendant. See the precedents in *Tidd's Forms*, 2d ed. 1804, p. 82. ss. 35, 38, 39.

(a) 2 Marsh. 232, n.

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Nov. 18.

BURTON v. KIRKBY.

Where a judgement had been entered up on a warrant of attorney given on an insufficient stamp, the Court held that the objection was cured by procuring the instrument to be stamped with the proper stamp.

And that, although the Defendant had already applied to the Court to set aside the judgement.

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VAUGHAN, Serjt., had on a former day obtained a rule *nisi*, to set aside an execution, judgement, and the warrant of attorney whereon the judgement had been entered, upon the ground that the warrant of attorney was given to secure distinct debts to four different persons, and that the stamp which it bore, denoted a duty, which, though sufficient for the aggregate sum, was insufficient for the four several parts into which the sum secured was divided. There was a defeazance, which declared that the warrant of attorney is given to *A*, *B*, *C*, and *D*, as a further and collateral security for 2,500*l.*, secured as follows, viz. 500*l.* to *A*, secured by a bond [therein described], a certain other sum to *B*, secured by a promissory note [therein described], and a certain other sum to *C*, secured by a certain other promissory note, and the residue to *D*, secured by a certain other promissory note. The statute (*a*) directs, that where "any bond shall be given as a security for the payment to different persons of separate and distinct sums of money, the proper *ad valorem* duty shall be charged in respect of each separate and distinct sum of money, and not upon the aggregate amount thereof."

Best, Serjt., on this day showed cause, upon the ground that since the rule *nisi* was obtained, the commissioners of the stamp duties being satisfied that no fraud was intended, of which he now produced an affidavit, had affixed to the warrant of attorney a stamp denoting the payment of a duty sufficient for the four distinct sums, and had remitted the penalty, which they are enabled to do by a former act (*b*). It would be of the most mischievous consequence, if every judgement, fine, and recovery, in which an improper stamp had been used, were thereby rendered absolutely void.

Vaughan, being called on to support his rule, contended that it would be of pernicious consequence to the revenue, if persons might, in preparing all sorts of legal instruments, elude the stamp duty, and procure the stamp to be then only affixed, when it was necessary to make use of the instrument in a court of

(a) Stat. 55 G. 3. c. 184. Schedule, Part 1. General Directions respecting Bonds, s. 3.

(b) 44 G. 3. c. 98. s. 24.

justice. This turns upon one of the earliest stamp acts (a), which made this instrument a mere nullity at the time when judgement was entered up, and no subsequent operation can make it good. Although the Court might, before an instrument was produced, defer a trial or other proceeding, in order that a party might in the interval obtain a stamp to be affixed, yet here, where the instrument had been put *in ure*, and was *functum officio*, and there was no further use for it, all that had been done under it was void, and the defect could not now be remedied. To introduce such a practice would open a wide field for collusion and fraud.

GIBBS, C. J. The proposition of the defendant's counsel is, that when a deed with a bad stamp had once been produced in the course of any legal proceeding, it can never afterwards be rendered available in that proceeding by the addition of a proper stamp. I am of opinion, that there is no foundation for this proposition, and that if a person produce an instrument at a trial, which is void for want of a stamp, and is therefore nonsuited, if he can get the deed stamped even before the trial is over, he may produce the deed on another trial.

PARK, J. This point has been decided in this very term, in the case of *Rogers v. James* (b), in which we held, that a commission of bankrupt, founded on a petitioning creditor's debt, the title to which arose under a will, of which probate had been granted with an insufficient stamp, might be supported without issuing any new commission, after the additional stamp had been applied to the probate.

Rule discharged upon payment of costs.

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(a) 5 *W. & M. c.* 21. s. 11. No such record, deed, instrument, or writing, shall be pleaded or given in evidence in any court, or admitted to be useful or available in law or equity, until as well the said duty, as the said sum of 5*l.* (a penalty) shall be first paid to their majesties' use.

(b) *Ante*, p. 147.

CHARTER, Demandant; SHEPHERD, Tenant; GWYNN, Vouchee.

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Nov. 21.

VAUGHAN, Serjt., moved to amend a recovery which had been suffered in 30 G. 3. of several manors, and amongst

The Court refused to amend a recovery by adding two pa-

rishes in unqualified terms after a large enumeration of lands, where the purpose of the amendment was only to include certain parcels of one out of many enumerated manors, which parcels were in the omitted parishes.

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 Demandant.

others the manor of *Hele Paine*, and of 5 mills, 50 tofts, 300 gardens, 2000 acres of land, 2000 acres of pasture, &c. in the parishes of *Thornton*, *Broad Hembury*, *Broad Clyst*, *Silverton*, and *Pay Hembury*, *Devon*, by inserting after the word *Pay Hembury* the parishes of *Bradninch* and *Butterleigh*, upon an affidavit that the manor of *Hele Paine*, the principal part of which was in the parishes of *Broad Clyst* and *Silverton*, was also in part situate within those parishes of *Bradninch* and *Butterleigh*, and that the deed to make the tenant to the precipe, conveyed the manor of *Hele Paine*, with all its rights, members, and appurtenances in the parishes of *Broad Clyst* and *Silverton*, or elsewhere in the county of *Devon*, and that the re-lessor intended the lands in the omitted parishes should pass.

The Court held, that this could not be done in the way in which it was prayed. The deed to lead the uses, it was true, passed the manor of *Hele Paine*, and enumerated certain parishes in which it was, and added the words "or elsewhere;" and a part of the manor lay in two omitted parishes. But the recovery conveyed many manors and a great extent of lands in many parishes. If it were permitted to add two more parishes in this unqualified manner, it would hereafter let the recoveror into proof of a recovery of any lands whatever, not exceeding the acres comprised in the recovery, whether parcel of this manor or not, so that they were situate in one of those two parishes. The Court could not permit an amendment which might apply to more than such part of this manor as lies in those two parishes, for the application had laid no ground for introducing other lands which were in the two parishes, but not in the manor; and they rejected the application (a).

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(a) In such case, how to word the amendment in such qualified terms that the Court will admit the amendment as not inconsistent with the caution which they here established, see *Lancaster, Demandant; Wilmot, Tenant; Boone, Vouchee, post. Hil. Term, 1817, 12 Feb.*

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POWELL v. RICH.

If the Plaintiff lays his action in the county of *A.*, where no part of the cause arose, and the Defendant moves to change it on the usual affidavit that the cause of action arose in the county of *B.*, and not elsewhere, which the Plaintiff falsifies by an affidavit that the cause of action arose partly in the county of *B.* and partly in the county of *C.*, the Plaintiff may retain the venue upon an alternative undertaking to give material evidence either in *A.*, where the cause did not arise, or in *C.*, where it did arise.

COPLEY, Serjt., had on a former day obtained a rule nisi, to change the venue in this cause from *London* to *Warwick*, on the usual affidavit, against which

Best,

Best, Serjt., showed cause, upon the ground that the action was brought for the price of goods, for which the order was given to the Plaintiff's agents in *Warwickshire*, and the goods were delivered by the Plaintiff to a carrier in *Holborn, Middlesex*, to be conveyed into *Warwickshire*; and he wished to extract an opinion from the Court, whether this would not satisfy the undertaking, which he proposed, of producing material evidence either in *London* or *Middlesex*, a latitude which the Court had before, in a like case, allowed (*a*).

Copley, in support of his rule, observed that it was unnecessary now to discuss the materiality of the evidence here: if the evidence was not material, the alternative option of two counties would not avail the Plaintiff; if it was material, he agreed that, after the late decisions, the Plaintiff had a right to retain the venue.

The Court discharged the rule upon the Plaintiff undertaking in the alternative, to give material evidence either in *London* or *Middlesex*.

(*a*) By *Mansfield*, C. J. in *Dick v. Norrish*, ante, III. 464. See also *Savory v. Spooner*, ante, VI. 566.

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BAKER v. SYDEE.

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BLOSSET, Serjt., had obtained a rule *nisi*, to set aside the judgement of *non pros.*, which had been signed in this case, or at least to return to the Plaintiff the money levied for the costs of an execution and sheriff's poundage, upon a *feri facias* for the Defendant's costs of the action. He moved this under the following circumstances: the Defendant, who was in custody in other suits, having previously given notice of his intention to take the benefit of the insolvent act, had, in *Trinity* term last, ruled the Plaintiff to enter the issue, which the Plaintiff omitted to do: the Defendant on 2d *July* signed a judgement of *non pros.* On the 10th, the Defendant was discharged out of custody by order of the Court for the relief of insolvent debtors, but neither this order, nor the Defendant's notice, or schedule, specified the Plaintiff's demand: after such discharge, on the 16th of *July*, * the Defendant issued an execution for the costs of

The statute 43 G. 3. c. 46. s. 5. does not enable a Defendant to levy the costs of an execution for his costs of an action.

The insolvent act 53 G. 3. c. 102. discharges a prisoner from the demands of such creditors only as are named in his schedule of creditors, notice of applying for discharge, and order of discharge.

And therefore his discharge does not interrupt the course of an action brought against him by a Plaintiff whose claim the prisoner has not included in his notice, and schedule of creditors.

the

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the judgement of *non pros.*, under which he levied 10*l.* 13*s.* 8*d.* for the taxed costs of the action, 1*l.* 11*s.* 6*d.* for costs of the execution, and 12*s.* for sheriff's poundage. *Blosset* contended, first, that the judgement was altogether irregular, for that the Defendant having given notice of his intention to take the benefit of the act for the relief of insolvent debtors, the Plaintiff was not bound to notice the rule to enter the issue, or incur any further expense in his action; secondly, that at all events a Defendant is not entitled to costs of his execution or poundage, the statute (*a*) being confined to Plaintiffs.

Best, Serjt., shewed cause. The Plaintiff was not warranted in disregarding the Defendant's rule to enter the issue. If he had entered the issue, and the Defendant had applied for judgement as in case of a nonsuit, his insolvency might have been a ground for awarding a *stet proccssus*. The Defendant did not apply to be discharged from the Plaintiff's demand, because he knew he had a good defence to this action: the Plaintiff therefore is not affected either by his notice, or his discharge, and was free to pursue his action. As to the latter part of the rule, he admitted it must be made absolute.

Blosset, in support of his rule, insisted that the operation of the statute (*b*) so entirely interrupted the course of all actions against the Defendant, that it rendered it impossible for the Plaintiff to proceed, and s. 21. gives a new remedy against debtors, even where no suit is pending: a creditor may come in, and have the rate extended to him. The act requires, 1st, a specific notice to the particular creditors at whose suit he is in custody, and then a general notice in the *London* gazette, which is notice to all the world. The prisoner is discharged, by the order of the Court, against those creditors who are specifically named, and he is also discharged by the laches of those who do not come in, against all the rest. He is discharged against those from whom the Court discharges him under this act, and against those who do not come in after the notice given in the *London* gazette.

GIBBS, C. J. If the Defendant had armed himself against the proceedings of the Plaintiff, by being discharged under the insolvent act, we never would permit him afterwards to take any step against the Plaintiff in regard of costs; but a debtor, by being discharged in other actions, does not thereby lose his

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(*a*) 43 G. 3. c. 46. s. 5.(*b*) 53 G. 3. c. 102. ss. 10. 31, 32.

power of proceeding for costs against a Plaintiff whose right to recover he disputes, and to whom he has never given notice that he, the Defendant, meant to be discharged from that debt. The act (a) directs the prisoner to publish a schedule of all the persons in the gazette; that notice, as we are at present advised, is notice only to those creditors who are named in the schedule. By s. 32. (the section which discharges the prisoner) it is enacted, that if any action shall be brought against him upon any cause of action from which he shall have obtained his discharge by virtue of that act, except under an order of Court, such prisoner may plead that he was discharged therefrom by the order by which such discharge shall have been obtained. There is no clause which says that the debtor shall be generally discharged of all debts, but only that he may plead the discharge of all debts from which he shall be discharged by the order of the Court. We therefore must look back to see what are the terms of the order for his discharge. By s. 10. the Court must in the order specify the persons against whose demand it discharges him. This is not a general discharge, therefore, but only as to such specific debts as the commissioners shall discharge him from.

Rule Absolute as to refunding the poundage;
discharged as to the rest; but without costs.

(a) Sect. 2.

MARTIN v. BOLD.

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ON SLOW, Serjt., had obtained a rule *nisi* that Mr. Poole, the deputy sealer of writs, might show cause why he refused to seal a writ of *capias ad respondendum* issued in this cause and signed by the filacer, with costs, and that he might produce the book or entry of the writs sealed at his office, and answer the matters of the affidavit, which stated that the Plaintiff's attorney, on 18th October, St. Luke's day, before three o'clock, until which hour, by the rule of Court (a), the seal-office ought not to shut, having obtained a writ signed by the deputy filacer, carried it to the seal-office, the outer door of which was then shut with a notice affixed that that day was a

The sealer of writs is not guilty of a contempt in refusing to seal a writ on St. Luke's day, being one of the holidays appointed by the statute 5 & 6 Edw. 6. c. 3. to be observed.

(a) Trin. Term, 54 G. 3. ante, V. 702.

holiday;

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1816. holiday; but that obtaining admission from Mr. *Poole*, the deputy sealer of writs, who was within and apparently attending there for the purpose of the business of his office, the Plaintiff's attorney requested him to seal that writ, stating that it was "a work of necessity," because the Defendant was about to leave the kingdom, and offering to pay him any sum which he thought fit to charge for sealing it. Mr. *Poole*, being apprised that there was an intention to try the right of taking extra fees on holidays, refused to make any charge for sealing it, said he was not then in business, as it was a holiday allowed by statute, and declined to seal it unless the Plaintiff's attorney chose voluntarily to pay him what other members of the profession were in the habit of paying, if their writs were sealed on a holiday. The Plaintiff's attorney declining to offer any sum, the writ was not sealed, and the Defendant, who was then on board ship, and about to quit the country, sailed before he could be arrested under the writ, which was sealed next morning at the opening of the office.

Lens and *Vaughan*, Serjts., now showed cause against this rule. In the first place, the officer was guilty of no contempt, for the Plaintiff never tendered to pay him even the ordinary fee, without which he was on no day bound to seal a writ. Next, *St. Luke's* day was one of the holidays appointed to be kept by the statute 5 & 6 *Edw. 6. c. 3.*, and without entering into the question, whether a holiday happening in term time should shut the offices, this happened in time of vacation. Two cases on a similar question, found in *Blackstone's* (a) reports, both relate to the feast day of *St. Barnabas*, a day not set apart to be kept holy by this statute, on which distinction they were decided. That day, also, in those instances, must be taken to have occurred in term time, otherwise that topic would not have been introduced into the argument; but the Court regulate that contingency. In *Pater v. Croome* (b), it was held that the 29th of *May* was not a legal holiday, but that determines nothing as to the effect of this statute, to which the observance of that day is long posterior. In *Worthy v. Palter* (c), this Court held that the Lord Mayor's day was not a holiday. *Tweeddale v. Fennell* (d) was decided on the impropriety of the clerk of the declarations receiving an

(a) *Figgins v. Willie*, 2 *Bl. Rep.* 1186.; and *Sparrow v. Cooper*, 2 *Bl. Rep.* 1314.

(b) 7 *Term Rep.* 336.

(c) *Anle*, V. 180.

(d) *B. R. Trin. Term*, 56 *G. 3.*

extra fee of 3s. 4d. for performing the business of his office on a holiday, viz. 29th *June*, *St. Peter's* day; but it does not decide that the officer may not refuse to perform his functions on a holiday, if he thinks fit so to do. This is the only case which relates to a holiday named in this statute, and Lord *Ellenborough*, C. J., says, if it be a legal holiday, make it a legal holiday, but not a source of profit by selling the seal. The officer was guilty of no extortion, he made no demand, he was willing to seal the writ, if the Plaintiff's attorney would have voluntarily paid what others pay. Probably he was wrong in thinking that the payment would have been so far voluntary, that, if not due, it could not be recovered back from him. The sealing of this writ was not, as the Plaintiff's attorney wished to insinuate, one of those "works of necessity" which the statute (a) contemplates. The officer acted as he did, because he had notice that the Plaintiff's attorney meant to raise this question; but the latter, having paid no fee, and having made this application on a legal holiday, is out of Court.

Shepherd, Solicitor-General, and *Onslow*, in support of the rule. The officer is sworn to have been attending for the business of his office, and his offer to seal the writ for a voluntary payment, is that selling of the holiday, which Lord *Ellenborough*, in *Tweedale v. Fennell*, held illegal. Whether Mr. *Poole* had made a demand, or received a voluntary gift, is immaterial: for if the necessity of getting the business done is urgent, it is a compulsion. If this may be done, there is no security that the officer may not impose a various fee upon each suitor, according to the urgency of his business. Though these days, which, as the statute says, are of man's institution, and not so sacred as some other days, are appointed to be kept, yet, if the officer is not in his house, or employed in religious worship, but is in the office for purposes of business, he ought to seal a writ equally for those who do and for those who do not give him money. The statute (b) directs that the eve of all these days, except two, shall be kept and observed fasting; and if so, the number of these pernicious holidays, already 55 in number, would be greatly increased.* The distinction between the feast of *St. Barnabas* and those days which are made holidays by act of parliament, is not taken by the Court, in *Blackstone*, but is only a *dictum* of that learned Judge. The

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(a) 5 & 6 Ed. 6. c. 3, s. 6.

(b) Sect. 2.

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restoration of King Charles the II^d is, like these days, made a holiday by act of parliament. *Blackstone*, J., thought it would have been better to limit the holidays in the offices to the days in which the Court sits not. Even though the Court may not think this is such a contempt upon which they are called on to grant an attachment, yet the transaction may be properly presented to the Court, for the mere purpose of the Court pronouncing whether it is a right practice or not, without any censure necessarily following; or if the case is presented for censure, yet still it is not highly culpable, and the Court may withhold the attachment. If the officer does any business on a holiday, either he does wrong, or, if he is warranted in doing any business, he ought to have for it only the same fee on holidays as on other days. Formerly the practice was, not to take a fee on each writ sealed on the holiday, but for the attornies to club a sum to have the office open for all of them. A question arose in this Court, whether a Defendant was bound to plead on the day of the Purification; and it was held that he was bound to plead, because the office was open on that day. *Onslow* concluded by asserting that this was an act of extortion, and that Mr. *Poole* was a criminal.

GIBBS, C. J. We are called upon to exercise our judgement on the conduct of Mr. *Poole*, who is cited before this Court as a criminal; and the question is, whether he has been guilty of any crime; and if he has, whether we can animadvert on him for it. The crime alleged, is, that on a holiday, *St. Luke's* day, he, being at his office, offered to seal a writ for the fee usually paid on holidays, and refused to seal the writ without it; but said, if you choose to pay voluntarily the usual fee, I will do it. The plaintiff's attorney stood on the point of honour, and would not pay the fee, and the writ was consequently not sealed. If these holidays were instituted only for the ease of the officer, I should think there was nothing unlawful in the officer taking a further consideration, and doing the business for it: but these holidays were instituted with a very different consideration, and it was intended that these days should be kept sacred, and no business done. A similar question, it is said, has lately occurred in the Court of *King's Bench* (a), and the Court said, if you will keep your holiday, keep it, but do not sell your holiday. It is said that Mr. *Poole* was at the office, ready to

(a) *Tweedale v. Fennell*, B. R. Trin. Term, 56 G. 3.

'seal writs for others, and that therefore he was *bound to seal a writ for the plaintiff, without any fee at all; [for the usual fee is not tendered to him;] but this motion is made against him as a criminal, and the uniform practice has long been, that on the holiday a further sum has been paid for sealing a writ: it is, at least, very questionable, whether this practice of attending on the office on holidays, gives others the right of making the officer seal the writ on that day, because he is found at the office; it being scarcely contended, that if he were at his house, or elsewhere, he would be bound to go thither for the purpose. We therefore think the charge is not substantiated, which alleges him to be a criminal; and whether he did right or not, we are not here called on to decide; if the party is aggrieved, and has lost his costs, he has his regular remedy, and may bring his action against the officer.

DALLAS, J. I am of the same opinion: if the party ought not to be in the office on that day, neither ought the attorney who applied on that day, or the client (who, on that day only, as it is sworn, instructed the attorney,) on that day to have applied there; therefore, in any way, I think this rule cannot be supported.

PARK, J. was of the same opinion. The Solicitor-General did not feel comfortable at the idea of making out Mr. Poole to be a criminal, but it is on that ground only that this motion could be supported. Where is the extortion of the act? If he is not bound to do extra labour on that day, it is, surely, not very unreasonable that he should demand an extra fee for his labour. In the two cases in *Blackstone*, and the case in *Taunton*, the distinction is taken between a holiday and no holiday. In all the cases the officer is supposed to be sitting at the feet of the Chief Justice, in Court, and on these days the Chief Justice is sitting in Court; and though the day upon which the question arose in *Tweedale v. Fennell, St. Peter's day*, when it happens in term, was a *dies juridicus*, yet, the Court said if it be an absolute holiday, keep it as such, but do not sell it for 3s. 4d.; and they ordered the officer to refund the money: here no money has been taken, and the rule must be discharged.

BURROUGH, J. I have anxiously watched to see whether any ground of complaint could be made out against this officer, as a criminal, and can find none. In many offices the officers avail themselves of these days to work up the arrears of their business,

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business, but refuse to take in new business; and it never was heard of, that they could be compelled to take in more on those days. Here no money has been taken, as had been done in the case of *Tweeddale v. Fennell*. If the Defendant be injured, he must bring his action; but in his declaration he must allege that the officer is bound by his duty to attend and do the duty on that day. Could this, then, be alleged and proved? There is not the least ground to say there is any charge of criminality against the party.

Rule discharged with costs.

Nov. 22.

LEE v. RISDON.

The price of fixtures to a house cannot be recovered under a declaration for goods sold and delivered.

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THIS was an action of *assumpsit*, for goods sold and delivered, tried at *Guildhall*, at the sittings after *Trinity* term, 1816, before *Gibbs*, C. J., wherein the Plaintiff sought to recover the price of certain fixtures, which the Defendant, becoming tenant of his house, *agreed to purchase of him at a valuation, and took possession: the valuation was made, and the price fixed at 17*l*. The Defendant protracting the payment, after five months the Plaintiff made a second agreement to accept 12*l*. in lieu of the 17*l*., if the Defendant would instantly accept a bill at three months for it; the bill was drawn, but the Defendant declined to accept it. The Plaintiff thereupon commenced this action. For the Defendant, two objections were taken; the one, that the fixtures could not be recovered under a count for goods sold and delivered, according to *Nutt v. Butler* (a): and *Horn v. Baker* (b) was supposed to be in point; the other, that the parties having agreed that the goods should be paid for by a bill at three months, the action was misconceived, and ought to have been an action for not accepting the bill, the three months not having expired before the writ was sued out; for this was cited *Mussen v. Price* (c), and *Dutton v. Solomonson* (d). The first point his lordship reserved; the second he overruled as inapplicable, holding it a sufficient answer, that the Defendant, having by his non-acceptance of the bill, repudiated the second and substituted contract, the Plaintiff had a right to repudiate

(a) 5 *Espin.* 176.

(b) 9 *East*, 215.

(c) 4 *East*, 176.

(d) 3 *Bos. & Pull.* 582.

it also, and to resort to his first agreement, under which the greater price of the goods was payable instantly; whereto the Court afterwards clearly agreed. The jury found a verdict for the Plaintiff for 17*l*.

Best, Serjt., in this term obtained a rule *nisi* to set aside the verdict, and enter a nonsuit.

Shepherd, Solicitor-General, now showed cause. *Horne v. Baker* was not a question what were goods and chattels, but it turned on the question, whereas, by the custom of certain trades, it is the practice of the owners of freehold hereditaments demised for purposes of the trade, to be also owners of certain fixtures and chattels accommodated to the trade, and to demise them with the freehold, whether the statute 21 *Jac.* 1. should extend to fixtures as well as the moveable chattels of that description; and it was held that the moveable vats were not within the practice to demise, but the immoveable articles were within the practice; and although there is no case in which fixtures in the possession of a bankrupt have been held to be in his disposition, within the statute 21 *Jac.* 1., yet that proves nothing for the Defendant, because they, being matters which are ordinarily demised, are, consistently with the statute, not necessarily supposed by the world to be the property of the bankrupt. *Horne v. Baker* had nothing to do with an action for goods sold and delivered; it was an action of tort. The first count was in case, the next in trover. After the argument, the counsel on both sides viewed the premises, and ascertained which of the articles were fixtures, and which not; and when they had so decided, the Court gave judgement for the fixtures, and not for the others. Fixtures in general are still chattels: they would go to the executor: though affixed to the freehold, they are recoverable in trover, which is a test. He also renewed the second objection.

Best, in support of his rule, denied that trover would lie for them. No authority for it was cited. To see that these are not goods and chattels, put the case of a felony.

GIBBS, C. J. I was struck by one proposition of the Solicitor-General, that these would pass to the executor; because the line is drawn the strictest, as Lord *Ellenborough*, C. J. observes, in *Elwes v. Maw*e (a), between heir and executor; and whatever is fixed cannot be severed. And it is to be re-

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(a) 3 *East*, 38.

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collected, that the right between landlord and tenant does not altogether depend upon this principle, that the articles continue in the state of chattels; many of these articles, though originally goods and chattels, yet when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold; and though it is in his power to reduce them to the state of goods and chattels again by severing them during his term, yet until they are severed, they are part of the freehold, as wainscots screwed to the wall, trees in a nursery ground, which, when severed, are chattels, but, standing, are part of the freehold, certain grates, and the like. And unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it; and it never, I believe, was heard of, that trover could be afterwards brought. Lord *Ellenborough's* judgement in *Nutt v. Butler*, I apprehend, proceeded upon this principle; and what my brother *Burrough* suggests to me, is very true, that felony cannot be committed of these things; for if a thief severs a copper, and instantly carries it off, it is no felony at common law; if indeed he lets it remain after it is severed any time, then the removal of it becomes a felony, if he comes back and takes it; and so of a tree, which has been some time severed. As to the other point, which was raised in *Mussen v. Price*, we think it does not arise here.

Rule absolute.

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Nov. 22.

CARTWRIGHT v. KEELY.

The cases in the King's Bench are argued, and the opinion of the Court pronounced, in *Serjeants' Inn* hall, in time of vacation; the judgement bears date of the ensuing term.

Second arrest for the same cause, allowable, where a judgement in a former action has been reversed for error.

COPLEY, Serjt., had obtained a rule *nisi* to discharge the Defendant out of the custody of the sheriff of *Nottingham*, on entering a common appearance, with costs to be paid by the Plaintiffs. He moved this upon the ground that the Plaintiffs had a second time arrested the Defendant while this action was pending in error in the King's Bench, and before judgement had been given thereon, or the action discontinued.

Best, Serjt., showed cause, upon an affidavit that before the second arrest judgement had been given in error by the Court of King's Bench, sitting at *Serjeants' Inn*, before *Michaelmas*

term,

term, 1816, whereby they reversed the judgement of the Court below, and the Plaintiffs had commenced a new action. The doctrine that a Defendant is not to be twice arrested for the same cause of action, is exploded, unless in the case where the second arrest is vexatious.

Copley, in support of his rule, referred to his affidavit, which stated that the judgement of reversal was not given till the 12th of *November*, in term time, which was after the arrest.

GIBBS, C. J. One sees plainly what the fact is, the case was argued in *Serjeants' Inn* hall, where the Court sometimes intimate an opinion, when they have a strong one; but they cannot pronounce judgement there.

Rule absolute, but without costs.

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GILL and Another v. DUNLOP.

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THIS was an action on a policy of assurance, dated 23d *May* 1808, at and from *Lima*, or any other port of *South America*, to any port in *Great Britain*, by the ships *Bons Irmaos* or *Triunfo Americano*, both or either. By a memorandum indorsed, the insurance was declared to be upon goods, dollars, bullion, both or either, against all risks whatever, *British* condemnation for illicit trade, and *Spanish* condemnation and charges of claiming in her port or ports of loading in *South America*, excepted. And by a second memorandum, it was agreed, that the vessels might touch at, discharge, and take in goods at *Cadiz*, without being deemed a deviation. The declaration averred that on 10th *April* 1809, divers goods, dollars, and specie, were shipped at *Lima*, on board the *Bons Irmaos*, to be carried on the voyage mentioned in the policy, and proceeded to aver the interest in the Plaintiffs, and a loss by capture and detention within the harbour of *Cadiz*, by certain persons acting under the command and authority of the government of *Spain*. The second count averred the loss to have been by capture and detention within the harbour of *Cadiz*, by certain persons unknown to the Plaintiffs. There were also counts for money paid,

The statute 42 G. 3. c. 77. made it legal for *British* ships to trade to the western coast of *South America* without licence from the *South Sea* Company, although they in no degree resorted thither for the purpose of fishing,

The statute 45 G. 3. c. 34. made it lawful, during the war, for *British* subjects to employ the ships of states in amity, under a licence from the king in council, to bring goods, under certain restrictions, from the western coast of *South America*, that being a

coast from which *British*-built ships might import such goods.

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money had and received, and, on an account stated, the Defendant pleaded the general issue. The cause was a second time tried at the sittings at *Guildhall* after *Hilary* term, 1816, before *Gibbs*, C. J. when a verdict was found for the Plaintiffs, subject to a case, with liberty for either party to turn it into a special verdict. The case, in substance stated, that the policy was subscribed by the Defendant on the 23d *May*, 1808. On 30th *March*, 1807, a licence was granted by his majesty in council to Messrs. *Thomas O'Gorman*, and other *British* merchants, authorizing them to export hence to the *Spanish* colonies, in *South America*, on board the *Portuguese* vessel, the *Bons Irmaos*, and four other neutral vessels, *British* manufactures and produce, to proceed to *Lisbon*, to take in quicksilver and other articles, and from thence to proceed to some of the *Spanish* ports in *South America*; and further permitting *T. O'Gorman* or his agents, or the bearers of his bills of lading, in return for the goods so to be exported, to import by the same vessels to any port of the United Kingdom, such quantity of the produce of the *Spanish* colonies, and bullion, as might be specified in their bills of lading, to whomsoever such property might belong, and notwithstanding all the documents accompanying such returns, should represent the same to be destined to a neutral or hostile port. That licence was to continue in force for twenty-four months: and by a subsequent order in council, and licence, both dated 24th *March*, 1809, the duration of the former licence was prolonged for one year. Under the authority of these licences, the Plaintiffs, who were *British* merchants, exported to *Lima* in *South America*, on board the *Portuguese* vessel the *Bons Irmaos*, a quantity of *British* manufactures: the ship sailed from *London* on her outward voyage on 11th *September*, 1807, and arrived at *Callao*, the port of *Lima*, in *December*, 1808, where her outward cargo was landed and sold. In *March*, 1809, returns of the goods so previously exported, and consisting of the goods and bullion insured, which were bark, the produce of the *Spanish* colonies, and dollars, were laden on board the *Bons Irmaos* at, *Lima*, by Mr. *T. O'Gorman*, on account of the Plaintiffs, for the purpose of being imported into the United Kingdom, and the bills of lading for the same goods and bullion were transmitted to and received by the Plaintiffs. Neither the Plaintiffs, nor Mr. *T. O'Gorman*, had any licence from the *South Sea Company*, authorizing them to trade within their limits, within which *Lima* is situated. In *April* 1809, the ship sailed on the voyage insured

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insured, and in the prosecution that of voyage was, in *October* 1809, captured and detained in the harbour of *Cadiz*, where her cargo was seized by persons acting under the government of *Spain*, and the Plaintiffs thereby sustained a total loss. Before and on the 30th *March*, 1807, when the licence was granted by the king in council, *Great Britain* was in amity with *Portugal*, and at war with *Spain*, and continued at war with *Spain* until the 4th of *July* 1808, on which day, by an order in council, all hostilities between this kingdom and *Spain* ceased. The question for the opinion of the Court was, whether, under these circumstances, the Plaintiffs were entitled to recover: if they were, the verdict was to stand; if not, a nonsuit was to be entered.

Best, Serjt., for the Plaintiff, stated the question simply to be, whether it was necessary, for legalizing this voyage, that the importer should be prepared with a licence from the government only, or with a licence from the *South Sea Company* also; and he contended that no *South Sea* licence was then necessary, as, at the time of performing this voyage, two acts of parliament, and a case pronounced in this Court, had decided this question. The words of the statute (a) are clear, which are, that his Majesty in council may grant licence to any *British* subject to import into this kingdom, for his own account, or for account of a subject of any state in amity with his Majesty, from any country in *America*, belonging to any foreign *European* sovereign or state, any goods, of the growth or produce, whether manufactured, or otherwise, of any such country, not prohibited to be used or consumed in this kingdom, in any ship or vessel belonging to any state in amity with his Majesty, and under such rules, regulations, restrictions, and securities, as his Majesty, with the advice of his privy council, shall approve, and subject to the same duties as such goods and commodities would be subject to, if imported in any *British*-built ship or vessel, and to the same rules, regulations, restrictions, securities, penalties, and forfeitures respecting the payment of the same; any law, custom, or usage to the contrary in anywise notwithstanding. This statute has therefore legalized this voyage, provided it would have been legal if performed by a *British* ship; it therefore puts neutral ships in the same situation as *British* ships are put in by the statute 42 G. 3. c. 77. Had the enactments of that statute been confined to its title, which is "An Act to per-

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mit *British*-built ships to carry on the fisheries in the *Pacific Ocean* without licence from the *East India* Company, or the *South Sea* Company," it certainly would not have authorized a trading voyage without that licence; but a statute in the enacting part often goes beyond the title. Here the enacting clause is, that any *British*-built ship, owned and navigated according to law, may pass through the Streight of *Magellan*, or round *Cape Horn*, to 180 degrees of west longitude from *London*, and may trade within the said limits, without having obtained any previous licence, permission, or authority, for that purpose, from the Court of Directors of the *East India* Company, or from the Governor and Company of Merchants of *Great Britain* trading to the *South Seas*, any thing in any law, charter, usage, or custom, to the contrary in anywise notwithstanding: that this statute authorizes a trading voyage, as well as a fishing voyage, was ruled in *Jacob v. Jansen* (a). In the present case the vessel is a trading and not a fishing vessel. It was argued there, that the legislature meant to legalize a trading by fishing vessels only, but the Court held that the act authorized ships sailing either for the sole purpose of trade, or for the sole purpose of fishing. A rule for the construction of statutes is, that where a statute is made for the advancement of trade, the largest construction shall be adopted. Since, then, this adventure would be legal if performed in a *British* ship, the only question is, whether this *Portuguese* vessel, being then the ship of a state in amity, be not put on the same footing as a *British* ship. The statute of 45 G. 3. passed in time of war, when the ships and mariners of this country were not sufficient for the purposes of trade and war which this country then wanted. To induce foreign crews and vessels to aid us in our trade, it was necessary to put them on the same footing as our own. It was the object of the legislature in this statute to effect that, which they do, even at the price of equalizing the duties with *British* ships, a course not usually taken with respect to foreign ships. It was said, on a former argument, that it was impossible so to construe this act, because the statute 55 G. 3. (b), which gets rid of the monopoly of the *South Sea* Company altogether, does not notice this statute. The reason why it is not noticed, is, that this statute expired six months after the expiration of the war, that was a statute made in, and providing for

(a) *Ante*, III. 534.

(b) 55 G. 3. c. 57.

the time of peace, and therefore it needed not to notice the expiring statute. The largest possible construction must be given to this act, that the country might avail itself of the advantage of foreign crews. Both these statutes are in *pari materid*: the construction of the one must therefore be called in aid of the other.

Marshall, Serjt., *contra*. The object of the statute 45 G. 3. c. 34. merely is to enable the king to dispense with the navigation act as to neutral vsseels. The king's license could not enable a foreign ship to do that which a *British* ship could not do. A *British* ship would have required a licence to trade with the enemy's colonies, and also a licence from the *South Sea Company*. That is not dispensed with by the statute 42 G. 3. c. 77. The title of that act is, "An act to permit *British*-built ships to carry on the fisheries in the *Pacific Ocean*, without license from the *East India Company*, or the *South Sea Company*." And the preamble recites that "it may tend to increase the *navigation* and *fisheries* (no more) of his majesty's subjects, if the restrictions now subsisting with regard to ships and vessels navigating in the *Pacific Ocean*, between *Cape Horn* and 180 degrees of west longitude from *London*, should be removed: it therefore proceeds to enact, that it shall be lawful for *British*-built ships, owned and navigated according to law, to pass through the Streights of *Magellan*, or round *Cape Horn* to 180 degrees of west longitude, and to trade within the said limits. A sound rule of construction of a statute, is, that the intention of the legislature may be gathered from the title and the preamble. The sort of trading contemplated, was merely such a trading as was subservient to the fisheries. If the statute 45 G. 3. had repealed the *South Sea Company's* charter, the statute 47 G. 3. sess. 1. c. 23. repealing their monopoly as to such parts of *America* as should be belonging to his Majesty, from the *Aranoco* on the east, round *Terra del Fuego* to the northernmost part of *America* on the west, would have been superfluous. By a statute 55 G. 3. (a), the exclusive rights of the *South Sea Company* are purchased for ever, at a large price, 610,464*l.* 3*s.* 0*d.* three *per cent.* stock. Why should this sum be given, then, if the nation had before broken through their monopoly? It would have been a most improvident grant of public money. *Jacob v. Jansen*, is not

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fairly cited. *Mansfield*, C. J., was startled at the consequence which would follow from the construction there contended for, and his first impression was the sounder judgement. The judgement ultimately amounts to this, that a ship may go to trade, or go to fish, but not for both purposes.

Best, in reply. It is unnecessary for the Plaintiff to support the justice of the first act, or the prudence of the bargain on the second act; the first was an act for a temporary purpose, namely, to meet the exigencies of the war, and we must intend that the company did not wish to exact in a period of war, a premium for that, which they were right in asking to be paid for in time of peace. The statute 47 G. 3., was an act made to apply only to such part of the possessions of the *Spanish* monarchy, which had then been captured by our arms; it was, by an accident, ineffectual even for that. The 55 G. 3. relates to a time of peace, and to the *Eastern* coasts. Even the preamble does not confine the object of the act to the fisheries only, the words are the *navigation*, and fisheries: if the legislature meant the fisheries only, it would have been sufficient so to have recited it. But they say the *navigation*, which is equally exercised for the purposes of war, trade, or fishing. It was designed to improve every branch of our foreign commerce. It is unnecessary to enable a vessel to trade for the purpose of supplying her with repairs or provisions; if she touches and takes provisions or timber for repairs, that would be no trading. The judgement in *Jacob v. Jansen*, does not decide that a ship must either solely trade, or solely fish, and that she cannot do both; neither is it to be concluded, that the first opinion of *Mansfield*, C. J., was, that the statute did not dispense with a licence, because he pauses, and states what would be the consequence of the decision: he was right in stating that such would be the consequence. This act 42 G. 3. was brought into parliament by Mr. *Jacob*, a merchant, who himself sent the first ship, after the act passed, on the adventure on which that action of *Jacob v. Jansen* arose. The larger and more liberal construction must be adopted.

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GIBBS, C. J. This is an action on a policy of insurance on the ship *Bons Irmaos*, a *Portuguese* ship, at and from *Lima* or any other port of *South America*, to any port or ports of *Great Britain*, with liberty to touch, &c. The vessel sailed on the voyage, and was seized in the port of *Cadiz*, and this action is brought to recover that loss. For the Defendant, it is insisted

that the Plaintiff cannot recover, inasmuch as the voyage insured was illegal, on the statute 9 *Anne* (a), which gives the *South Sea Company* the exclusive privilege of trading within certain limits, within which *Lima* is situate; and if the voyage be unlawful, it is truly said, the insurance was unlawful, and the Plaintiff cannot recover. For the Plaintiff it is said, that the statute 42 G. 3., assisted by the statute 45 G. 3., removes that objection. On the first trial reference was made to the act 45 G. 3. only; and I should still think, as then I did, that the act 45 G. 3. standing alone, would not remove the objection. But on a motion for a new trial, my Brother *Lens* urged, that the argument on the 45 G. 3. was mainly supported by the statute 42 G. 3., and the argument then stood thus: by the statute 9 *Anna*, for any *British* ship to trade to this port, is unlawful: by the 42 G. 3. any *British* ship for fishing or trading may pass the Straights of *Magellan*, or double *Cape Horn*, and go to 180 degrees of west longitude. Then it is said, this port of *Lima* is within that longitude, and for a *British* ship to trade thither would therefore be lawful; and it is next said, that the 45 G. 3. enables the king to license any ship of a state in amity to perform any voyage which a *British* ship may perform. I see no answer to that argument, if under the act 42 G. 3. a *British* ship may perform such voyage. The counsel for the Defendant has strongly urged that that act does not legalize a mere trading voyage, but only a fishing voyage; and that this present adventure does not fall within that description. It is a sufficient answer to say, that the same argument was urged, and fully considered in the case of *Jacob v. Jansen*, and that the deliberate judgement of the Court was, that the statute extended, as well to a trading as to a fishing voyage; and that so only could they give a reasonable construction to the act. The judgement of *Mansfield*, C. J., has been attacked, first, on the ground that his first impression was to doubt; 2dly, upon the ground, that the judgement which he pronounced is so absurd that it cannot be followed up, because he is supposed to have holden that it must be either solely a fishing, or solely a trading voyage. As to the first objection, I do not read those doubts expressed in the report; but if there had been such, I should have said, as I before observed, that they had better

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have been omitted: that the only part of a report which is worth attending to, is the deliberate judgement of the Court pronounced on consideration. Neither do I see any ground for the second objection to the judgement. This arises from the counsel for the Defendant taking the judgement without the subject-matter to which it applies. It had been argued that the statute was applicable only to a trading by a fishing ship; and in answer thereto, the Chief Justice says, it applies either to a wholly trading, or to a wholly fishing voyage. There is no ground to assert, either that his Lordship meant to say, that the statute did not apply to a voyage for the mixed purpose of fishing and trading, or that he is so reported. It is urged that the 42 G. 3. rendered the statutes of the 47 and 55 G. 3. unnecessary. But that is not correct. The 42 G. 3. removed only a part of the *South Sea Company's* monopoly, namely, along the west coast of *South America*, and left something to be purchased by the legislature, which had not been destroyed by the 42 G. 3., namely, the freedom of trade on the eastern coast, which remained to be bought up under the 55 G. 3. I am of opinion therefore, that the 42 G. 3. does authorize both the trading and the fishing, either jointly, or severally; and I found that opinion not merely on the case of *Jacob v. Jansen*, but on the words of the statute also. It has not been argued by the counsel for the Defendant that the 45 G. 3. will not entitle a ship of *Portugal* to the same privileges as the 42 G. 3. gives to *British* ships; nor would the words of that statute permit a question to be raised on it. I therefore am of opinion that the Plaintiff is entitled to recover.

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DALLAS, J. If this were a new question, it might be contended with some propriety, that the trading was to be confined to a trading subservient to the purposes of fishing; but though the preamble is called the key of the act, yet on perusing the enacting clause, I see with sufficient clearness that it applies to trading as well as to fishing; for, as to the argument that trading means the buying provisions and other like matters, they are necessary for fishing, and therefore are part of the license to fish. The trading here spoken of must mean something more. But it is not a new question, and I fully subscribe to the authority of *Jacob v. Jansen*.

PARK, J. To say that the trading is to be a trading subservient to the purposes of fishing, is to add a comment to the act,

act, much longer than the act itself. If there ever were any doubt on the point, the case of *Jacob v. Jansen* has removed it: it is said by the counsel for the Defendant, that the subject may do the one, or the other, but not both. The late Chief Justice never meant to say (nor is it expressed in the report of the judgement, which, though short, is very clear), that he doubted whether both objects might be combined. I therefore concur with my Lord Chief Justice and my Brother *Dallas*, that the judgement must be for the Plaintiff.

BURROUGH, J. If this were not a perfectly clear case, or if I saw any reason to differ in any one point from the judgement in *Jacob v. Jansen*, I should express my opinion more at large; but inasmuch as I fully coincide with the deliberate judgement of the Court in that case, I need say nothing more on that subject. As to the other question, whether the 45 *Geo. 3.* makes the former act applicable to this case, that question is equally clear; and there must therefore be

Judgement for the Plaintiff.

Marshall, Serjt., on a subsequent day stated the Defendant's election to turn the special case into a special verdict, and he prayed to make it a special verdict of the same term, that a writ of error might be immediately brought.

GIBBS, C. J. The Court wish a circumstance to be adverted to, and its effect on this record to be considered, which was not adverted to at the bar upon the argument. The statute 45 *G. 3.* legalizes only an adventure to the *Western* coast of *South America*. The policy is from *Lima*, or any other port or ports on the coast of *South America*. Those terms in the policy comprehend a ship which should sail from the *Eastern* coast of *South America*; it is a question, whether, inasmuch as she would not in that case be protected by those statutes, the policy be not an illegal contract. It is stated on the case, that the ship sailed from *Lima*; and there is no objection whatsoever to the voyage which she did perform, or to the voyage which it was intended she should perform. But upon that point, we think the case ought to be argued again, before we give consent to its being turned into a special verdict.

The case was not again argued, but this day, upon the motion of *Best*, the special verdict was set down for judgement *pro formâ*, that it might go to the court of error.

Judgement for the Plaintiff.

The case was again called on for further argument on a former

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mer day in this term (*a*), when it was stated from the Bench, that an answer had occurred to the objection last taken by the Court, viz. that although the policy might comprehend certain voyages which could not be performed without the licence of the *South Sea Company*, yet there was nothing to show, that if the assureds had wanted to pursue such a voyage, they would not have obtained such a license. It had been decided in this Court (*b*) that where a policy covered two descriptions of voyage in the alternative, the one lawful without a license, the other capable of being rendered lawful by obtaining a license, and the lawful voyage was performed, the Court held that they would presume that a license for the other voyage would have been obtained, if that voyage had been elected.

(*a*) In the absence of the reporter, who was attending elsewhere on a melancholy duty : but full reliance may be placed on the accuracy of the very learned person, on whose authority this is stated.

(*b*) See *Sewell v. The Royal Assurance Company*, ante, IV. 856. and *Haines v. Busk*, ante, V. 527. In the last case it was held, that even where a contract was effected in terms so large as to comprehend a legal, and an illegal voyage not capable of being legalized by any license, yet, if the legal voyage only was contemplated and pursued, the largeness of the terms of the contract should not avoid it.

Nov. 25.

HANCOCK v. WINTER.

The words, "She is a great thief; she ought to have been transported," are not in substance proved by evidence of the words "she is a damned bad one; she ought to have been transported." The words "she ought to have been transported," expressing only the opinion of the speaker, are not of themselves actionable.

THIS was an action on the case for defamation: the words imputed to the Defendant by the second count of the declaration were, "*Hancock's* wife is a great thief, and ought to have been transported seven years ago." Upon the trial of the cause, at the *York Lammas* assizes, 1816, before *Wood, B.*, the words proved were, "*Hancock's* wife is a damned bad one; she ought to have been transported seven years ago." *Wood, B.* thought that in these words the second count was substantially proved, and the jury found a verdict for the Plaintiff.

Hullock, Serjt., in this term obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground that the evidence showed a fatal variance.

Copley, Serjt., now showed cause. He urged that the words were in substance proved, and it was unnecessary to prove the precise words. Neither was it necessary that all the words al-

At least, unless connected by innuendo with a *colloquium* of felony. By *Burrough, J.*

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leged should be proved: it sufficed if any words were proved on which an action could be *maintained; and the words, "she ought to have been transported seven years ago," were actionable. *Don's* case (a). "If you had your deserts, you would have been hanged seven years ago." These words were held actionable.

GIBBS, C. J. This is a question whether the words alleged are proved. The words alleged imply theft. The words proved are, that in the opinion of the speaker the person mentioned ought to be transported, but the Defendant may think that the other ought to be transported for acts which are not the offence of theft. Therefore the words do not necessarily infer the commission of that crime.

BURROUGH, J. The case in *Croke* was not on a question of variance: that makes all the difference. If this declaration had stated that there was a conversation about a theft and a felony, and that the Defendant spoke these words, with an innuendo that he intended she had been guilty of the felony, it might suffice; but this declaration is not so. The contrary decisions, too, are the latest, and, in one of the late cases, the Court observe that it is only the opinion of the speaker.

(a) *Cro. El.* 62.

THOMAS v. PEMBERTON and KITTRIDGE.

Nov. 25.

THIS was an action of *assumpsit* for the mismanagement of a farm, by carrying off the straw and manure, and the Plaintiff averred that the Defendants *were tenants of the farm to the Plaintiff, and in consideration thereof undertook to treat it in a husband-like manner. The cause was tried before *Richards, B.*, at the *Stafford* summer assizes, 1816, when the facts appeared to be, that the Plaintiff had let the land to *Scarratt*, who had since become a bankrupt, and the Defendants were the assignees under his commission. That the acts of mismanagement complained of had been committed, was clearly proved, and the only question was, whether the Defendants were liable; which turned on the fact, whether they had elected to take to the bankrupt's interest in the farm. It was proved that at a meeting be-

If the assignees of a bankrupt intermeddle with and assume the management of a farm, this is a sufficient election to take to the term, and makes them liable to the landlord, in consideration of their tenancy, for all mismanagement.

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tween the Plaintiff, his agent, and the two Defendants, and their solicitor; the Plaintiff stated the object of the meeting to be, to ascertain whether the Defendants would take to the bankrupt's interest in the premises. The Defendant *Pemberton* said, it was a very material question for them, and would require consideration before they could determine; they would give an answer on the following *Thursday*, on which day *Pemberton* alone came, and said they must hold the premises until the *Lady-day* following (the period of the year from which the term was computed). The Plaintiff caused *Scarratt* and both Defendants to be served on the 22d *September*, with a notice to quit at the ensuing *Lady-day*: when *Kittridge* received it, he said, "it is what I expected." Evidence was given that *Pemberton*, who lived near the spot, frequently, and *Kittridge*, in some instances, had given orders to workmen on the farm; they were solicitous that the Plaintiff should accept *Scarratt* as tenant, but he refused so to do. They continued in possession of the farm till *Lady-day*, when they quitted. The Defendant *Kittridge*, on a subsequent occasion, said, that he had found *Scarratt* on the farm, and had left him there. On another occasion he said, "I wish I had never seen the farm, nor had any thing to do with it." For the Defendant it was contended, that there was no evidence that the Defendant *Kittridge* had assented to take to the farm, and that if he had not, then, inasmuch as both the assignees had not jointly taken to it, the allegation that the Defendants were tenants to the Plaintiff failed in proof, one of them alone not having authority or interest so to do; and the Plaintiff could not recover. The jury found that *Kittridge* had never elected to take to the farm, and gave their verdict for the Defendants.

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Copley, Serjt., in this term obtained a rule *nisi*, to set aside the verdict, as contrary to the evidence, and to have a new trial.

Vaughan, Serjt., showed cause, and endeavoured to maintain that there was no evidence against *Kittridge*, for that his acts on the farm were all referable to the interest he had as assignee in the bankrupt's stock, independent of his term in the land. Further, he conceived, that the election to take to the farm could only be made and expressed, if the formalities were observed which are prescribed by the late statute (a).

But the Court held, that *Kittridge's* language, that he expected the notice to quit, and *Pemberton's*, that he had nothing to

(a) 49 G. 3. c. 121. s. 19.

do with the farm but to pay the rent, and *Pemberton's* affirmative answer given on the *Thursday* to the question which, at the preceding meeting, had been addressed to both, (after which conversation a very slight matter would suffice to bind *Kittridge*,) and their keeping possession of the farm till *Lady-day*, after the Plaintiff had decidedly refused to let it to the bankrupt, as well as the acts done on the farm, which were not confined to the assignees' interest in the other chattels, in a word; all the evidence showed that as well *Kittridge* as *Pemberton*, had elected to take to the farm: and they made the rule

Absolute (a).

(a) *Gibbs*, C. J., was absent on this day, in consequence of indisposition.

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DOE, on the Demise of COLE, v. GOLDSMITH.

Nov. 26.

THIS was an ejectment brought to recover certain premises in *Orworth, Suffolk*; the cause was tried at the *Bury spring assizes*, 1816, before *Wood*, B. A verdict was found for the Plaintiff, subject to a case, the only material parts whereof were, that *F. Goldsmith* the elder, being seised in fee of the premises, made his will, dated 12th *March*, 1793, duly executed and attested for passing real estates, and thereby devised to *F. Goldsmith*, his son, all his lands and hereditaments whatsoever and wheresoever, were the same freehold, copyhold, or leasehold, or of any other nature or tenure whatsoever, to hold to him and his assigns for his natural life, and immediately after his decease, he devised the same premises unto the heirs of his body lawfully to be begotten, in such parts, shares, and proportions, manner, and form, as *Francis* his son, should by will duly executed, or deed executed in the presence of two credible witnesses, devise or appoint, and in default of such heirs of his body lawfully to be begotten, then, immediately after his decease, the testator devised the premises to his son *John Goldsmith* in fee. And the testator thereby subjected and charged his real estates with the payment of certain legacies, in case his personal estate should not be sufficient, and thereby gave the legatees power to enter and distrain for the same. The testator afterwards, on the 21st *February*, 1799, made a codicil to his will, whereby, reciting that he had

Devise to *F. G.* and his assigns for his life, and immediately after his decease, unto the heirs of his body lawfully to be begotten, in such parts and shares as *F. G.* should, by will or deed, appoint; and in default of such heirs of his body, then immediately after his decease, over to *J. G.*: Held that *F. G.* took an estate-tail by implication.

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by his will given all his estates, as well real as personal, to his son *Francis*, upon condition of his paying thereout the sum of 100*l.* a-piece to the testator's sons *John* and *Charles*, and the sum of 50*l.* a-piece to the children of his late daughter, he thereby further charged his said estates, as well real as personal, to and with the payment of certain further legacies, with the like power of distress, and he ratified and confirmed his will. The testator died in 1799, without revoking or altering his will, save as the same was altered by his codicil, and the same were proved by *Francis*, his eldest son and heir at law, who possessed himself of the freehold estates thereby devised to him, and also of the personal estate, (which was sufficient for the payment of his debts and legacies,) and paid all the charges and legacies mentioned in the will and codicil. *F. Goldsmith*, the son, in *Trinity* term, 1803, suffered a common recovery of the estates so devised to him, and by lease and release of 22d and 23d of *June*, 1803, limited the same to himself in fee, and died in the year 1813, leaving the Defendant *J. Goldsmith*, his brother, named in the will of *F. Goldsmith*, the elder, his heir at law, and having himself devised the premises to the Plaintiff's lessor in fee simple: at his death the Defendant possessed himself of the premises. The question for the Court was, what estate *F. Goldsmith* the younger took in the premises by the will of *F. Goldsmith* the elder, or by the common recovery, or as heir at law of *F. Goldsmith* the elder? If the Court were of opinion that *F. Goldsmith* the younger, at the time of his death, was only entitled to a life estate in the premises, then a nonsuit was to be entered: if they were of opinion that he was entitled to an estate in fee simple, then the verdict for the lessor of the Plaintiff was to remain.

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This case was argued on a former day, by *Blosset*, Serjt., for the Plaintiff, and *Copley*, Serjt., for the Defendant; but as their principal arguments are recapitulated in the judgement of the Court, it is unnecessary here to give them at length. *Blosset* cited *Doe on demise of Candler v. Smith* (a), *King v. Melling* (b), *Doe on demise of Davy v. Burnsall* (c), and *Doe on demise of Gilman v. Elvey* (d). *Copley* referred to *Lodding v. Kyme* (e), and the judgement of *Lawrence, J.* in *Pierson v. Vickers* (f).

(a) 7 Term Rep. 531.

(d) 4 East. 313.

(b) 1 Vent. 214. 225. S. C. 2 Lev. 58.

(e) Salk. 322. S. C. 3 Lev. 431.

(c) 6 Term Rep. 30.

(f) 5 East, 548.

The Court took time to consider until this day, when

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GIBBS, C. J., delivered their judgement. After stating the facts of the case so far as the devise over to the Defendant, beyond which, his Lordship observed, it was not necessary to state more of the will, he thus continued: the lessor of the Plaintiff insists that *F. Goldsmith*, the devisee, took by this devise an estate-tail by implication, and if so his recovery could defeat the remainder over, and then the Plaintiff's lessor is entitled to recover. It is insisted for the Plaintiff, first, that this is an estate-tail by implication; secondly, if it be not such, yet that *F. Goldsmith*, the son, as heir at law of the devisor, would be entitled to the fee-simple, by the destruction of the contingent estates; for if this devise do not create an estate-tail, the Plaintiff's counsel contends that it creates an estate to *F. Goldsmith*, the younger, for life, with a contingent estate in remainder to his issue, and a contingent estate in remainder limited over to *John Goldsmith*: that is the argument. On the other hand, it is insisted, that *Francis Goldsmith* takes only an estate for life, that the words "heirs of his body," are not words of succession, but are to be construed to mean children; that they also take only estates for life, because no words of inheritance follow the estates devised to them; that the remainder over to *John Goldsmith* is, therefore, a good vested remainder, which was to open and let in the contingent remainder to the children of *F. Goldsmith*, if any such should ever be born. As to that proposition which is first contended by the counsel for the Plaintiff, that this is an estate-tail by implication, he relies on the words "and in default of such heirs of the body of *F. Goldsmith*, then, immediately after his decease, over to *J. Goldsmith*," and contends that these words mean that the estate is to go over upon an indefinite failure of issue of *F. Goldsmith*. The Defendant's counsel answers, that this would be the effect of the words, if the words "heirs of the body" had their usual signification in this place, but that here the words "heirs of the body" mean children of *F. Goldsmith*, the younger; for that when he devises to the heirs of the body of *F. Goldsmith* in such shares as the tenant for life shall appoint, that is a gift to persons who must be *in esse*, when *F. Goldsmith* was to appoint to them: that the default of such issue must therefore be a default of such persons, who can only be the children; and that the testator by this expression, therefore, manifestly means to refer to the same persons who were to take as tenants in common under the appointment, not to the heirs of

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of the body of the first taker in the ordinary legal sense. There certainly is much obscurity in this will; and if we were compelled to conjecture what the testator meant, possibly we should not wholly succeed. But it is an established rule, that where a general intent appears, any particular intent which appears, however clearly expressed, shall never take effect where it is inconsistent with the general intent. And, I confess, it seems to me clearly to be the testator's general intent, that the estate should never go over to *John Goldsmith*, till all the heirs of the body of *F. Goldsmith* were extinct. I do not think the testator had a clear understanding of the meaning of the words "heirs of his body," nor did he, perhaps, know whether he meant heirs female as well as heirs male. I therefore must take the words according to their legal signification; but I think it is clear, that he never meant that the estate should go over, until those heirs of the body of *Francis* were extinct. Several cases were cited, *Doe on demise of Candler v. Smith*, *Doe on demise of Cock v. Cooper*, and *Pierson v. Vickers*. If it were necessary to cite cases, most of those cases support the principle on which we now proceed; and the facts of this case are fully as strong as of those. We are of opinion, therefore, that an estate-tail by implication does arise in this case, and, consequently, that the recovery was well suffered, and that the judgement must be

For the Plaintiff.

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A general reference of all disputes, differences, and demands between the Plaintiff and Defendant in an action, does not confer on the arbitrator power to award the costs of the reference.

If the party in whose favour an award is made, demand more than is due to him, he cannot have an attachment for the non-payment on that occasion of the sum which is due.

PELL, Serjt., had on a former day obtained a rule *nisi* for an attachment against the Defendant for non-performance of an award, in not paying the sum thereby directed to be paid by the Defendant, under the following circumstances. An action had been commenced on a bond given by the Defendant to indemnify a parish against the maintenance of a bastard child, and *an action had been commenced thereon, which being ripe for trial, it was agreed to refer, and the parties entered into bonds of submission, which were made a rule of court; and the rule recited that an action had been commenced by the Plain-

tiff

tiff against the Defendant; it stated the grounds of the action, that notice of trial had been given, that it had been agreed that such notice of trial should be countermanded, and that the costs of such action should abide the event of the award, as if the cause had been actually tried at the *Chelmsford* assizes pursuant to that notice. And the submission was of all disputes, differences, and demands between the parties, except the costs of the action, which (it was repeated) were to abide the event, as if the cause had been tried at the *Chelmsford* assizes, pursuant to the notice given. The arbitrators had awarded the costs of the reference, as well as of the cause, to be paid by the Defendant.

Best, Serjt., for the Defendant, showed cause against this rule. He contended that an arbitrator had no power over the costs of an award, where that power was not expressly delegated to him, for which he cited *Candler v. Fuller* (a). And the reason why they are not included in a general submission of all matters in difference is, that they are a matter arising after the submission. In *Wood v. O'Kelly* (b), indeed, the Court of King's Bench held, that a submission to arbitration of costs generally, would include the costs of the reference; but in this case the submission is restricted. Here is no submission of any costs. In *Brown v. Marsden* (c) this Court held, that the costs of a reference were not included in the costs of the action. In *Bradley v. Tunstow* (d), indeed, this Court seems rather to differ from what was supposed to be the practice of the Court of King's Bench; but that Court says, in the case of *Wood v. O'Kelly*, that it must have been the form of the rule in the Court of Common Pleas which makes the difference. Here the rule brings the parties within the case of *Brown v. Marsden*, for the terms of the rule are express, that the costs of the cause shall abide the event; therefore the Court will not grant an attachment. Here the Plaintiff might have had all he was entitled to, for it is sworn that the Defendant tendered all except the costs of the award; and if the Court will put the Plaintiff to sue on the award, the Defendant can plead that tender; at all events, where the right is doubtful, the Court will not proceed against the Defendant as for a contempt.

Pell, in support of his rule. The submission is as ample as possible, and if it had omitted the exception of the costs of the action, it would have been in the very terms of *Bradley v. Tun-*

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(a) *Willes*, 62.(b) 9 *Rast*, 456.(c) 1 *H. Bl.* 223.(d) 1 *Bos. & Pull.* 34.

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stow. A later case, *Fitzgerald v. Graves (a)*, precisely meets this on principle. It shows that under the terms of a general submission, the arbitrator has a power to award how the costs of the reference shall be paid. The Defendant ought not to have shown cause against the attachment, but to have moved, if he thought the costs of the reference excessive, that the prothonotary might review his taxation.

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GIBBS, C. J. This is an application to the Court for an attachment against a party, for not paying a sum of money said to be awarded to him. In order to support an attachment, the Plaintiff must show that he had demanded what was due to him; and if he has demanded more than was due to him, he cannot have an attachment for the Defendant's failure of compliance. The sum demanded included the costs of the reference, as well as the costs of the action: if a part only of that sum was due, the Plaintiff cannot support his attachment; and in order to see what is due, we can look only to the award. The reference is of all matters in dispute between the parties; and it is provided, that the matters in dispute between the parties, and also between the Plaintiff and the parish officers, shall be referred, and that the costs of the suit shall abide the event, as if the cause had been tried at the *Chelmsford* assizes; and by the bond of submission all matters are referred, except the costs of the action or suit, which are to abide the event of the reference. The question is, whether this submission includes the costs of the reference. The counsel for the Plaintiff insists, that unless they are excepted, an arbitrator has a right to give them; for that where he has power to give costs generally, they include the costs of the reference, and here the costs of the cause only are excepted: the fallacy of his argument is, that, take the thing excepted away, there is nothing said in this submission about costs. If any words had preceded the exception, which would include general costs, then the limited exception would not take them away; but the misfortune of the Plaintiff's case is, that he has no such previous words: the cases which the Plaintiff's counsel cites, are cases where power is given to the arbitrator to give costs generally, and it has been deemed that such costs include the costs of a reference: therefore we are of opinion, that part of the award which is for this sum cannot be supported, and that the rule for an attachment must therefore be

Discharged (b).

(a) *Ante*, V. 342.

(b) *Grove v. Cox, ante*, I. 165. *acc.*

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DOE, on the Demise of HAYES and Others, v. STURGES.

Nov. 26.

THIS was an ejectment for certain premises in the parish of *St. Mary-la-bonne, Middlessex*. The Plaintiff declared upon six demises of persons who claimed title to the premises: the demises were severally laid on the 2d October, 55 Geo. 3. The cause was tried at *Westminster*, at a sittings in *Easter term*, 1816, before *Gibbs, C. J.*, and a verdict was found for the Plaintiff, subject to a case, the material parts of which were, that

Samuel Hayes being possessed of the premises, which were leasehold, for the residue of a term of ninety-three years from 24th June, 1760, by his will, dated 9th May, 1786, devised the premises to his nephew *Samuel Hayes* (afterwards the Rev. *Samuel Hayes*), for so much of the term and interest, which he, the testator, should have therein at the time of his decease, as his nephew should live, for his own use and benefit, subject to the rents, covenants, and agreements contained in the original lease; and after his nephew's decease, the testator devised the same to all and every the children of his nephew *Samuel Hayes*, and unto *John Hayes*, the son of his late nephew *John Hayes*, as tenants in common, and their respective executors, administrators, and assigns, with benefit of survivorship, if any of such children, or the said *John Hayes*, should die under the age of twenty-one years. And the testator appointed the said *Samuel Hayes*, *John Buckley* the elder, and *John Buckley* the younger, trustees and executors of his will. The will contained a power for his nephew *Samuel Hayes*, during his life, and for the surviving trustees, after his decease, to demise his leasehold premises to any person for any term not exceeding twenty-one years* in possession, and at the best and utmost rent which could then be really had for the same, and subject to the usual covenants, conditions, and agreements on the part of the lessee, for upholding and keeping the premises in repair, and without taking any sum of money, fine, or gratuity whatever, for granting such lease, and so as such lessee did execute a counterpart thereof. The testator died in *September*, 1787, without having altered or revoked his will, possessed of the premises, which will was duly proved, but was not registered. *John*

S. H. devised a term to his nephew *S. H.* for life, with remainder over, with a leasing power for twenty-one years, and made *S. H.* and two others executors. *S. H.* entered, and was possessed, and alone demised the premises for forty-two years, reserving rent to himself, his executors, &c. Held that neither his entry on the land, nor his sole lease reserving rent to himself and his executors, which was alike inconsistent with his interest as tenant for life, and his duty as executor, should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as executor.

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Buckley the elder, one of the said trustees and executors, died in *January* 1795. The Rev. *Samuel Hayes*, the nephew, upon the testator's death, took possession of all the property devised and bequeathed to him by the will, and, amongst others, the premises in question; and, by indenture, dated 9th *July* 1791, he demised the premises to *James Gilmour*, his executors, administrators, and assigns, for the term of fourteen years and one quarter from *Michaelmas* then next, at the rent of 36*l. per annum*, which was thereby reserved to the said *S. Hayes*, his executors, administrators, and assigns, with the usual covenants to pay rent and repair, &c., and the usual powers for re-entry; and in the lease there was a further demise, whereby, "in consideration of the said *James Gilmour*, his executors, administrators, and assigns, performing the usual covenants, clauses, provisoes, and agreements thereinbefore mentioned and required, the said *S. Hayes* thereby leased to him, his executors, administrators, and assigns, the premises, together with all improvements and erections and buildings then appertaining or which thereafter might belong to the same, from the 26th *December* 1805, for the further term of forty-two years, paying to the said *S. Hayes*, his executors, administrators, and assigns, the yearly rent of 36*l.*, and a further yearly sum of 5*l.*, during the last granted term, as and for the rent and ground-rent of the premises, payable quarterly, and subject to such like covenants, clauses, provisoes, and matters, as were before therein contained on the lessee's part. *S. Hayes* the nephew made the contract for this lease in his own name only, and without any mention of any other persons being jointly concerned in interest with him, and the rent of thirty-six pounds mentioned in that lease was a rack-rent at the time the lease was granted. The lease had been registered; and the interest derived under the same was now vested in the Defendant, as a purchaser thereof, for a full and valuable consideration. *S. Hayes*, the nephew and devisee and legatee, had issue *Richard Hayes*, *Charles Hayes* (one of the lessors of the Plaintiff), and *Elizabeth Hayes*. The said Rev. *Samuel Hayes*, by his will, dated 8th *November* 1795, reciting that his uncle *S. Hayes*, after his own death, had bequeathed (amongst other things) the premises then let to *Gilmour*, the rent of which was to be raised 5*l. per annum* at the expiration of the then present lease, and further reciting, that the first testator had appointed *J. Buckley*, and *J. Buckley, jun.*, "jointly with himself, trustees for that property,

perty, directed as follows: As Mr. *J. Buckley* is dead, I think it fit that other trustees should be joined with Mr. *J. Buckley* the survivor, after my decease; I do therefore appoint, as far as I am legally empowered to do, *James Bate* and *John Trip-hook* (one of the lessors of the Plaintiff) joint trustees with Mr. *John Buckley*, for the security of the property bequeathed by my uncle to my children." The Rev. *Samuel Hayes* died in December 1795, leaving his said three children, *Richard*, *Charles*, and *Elizabeth*, him surviving. The case then proceeded to state the title which the numerous lessors of the Plaintiff in this case, derived to themselves, under the will of *Samuel Hayes* the elder, and by divers mesne conveyances and descents.

The question was, Whether the lessors of the Plaintiff, or any of them, were entitled to recover the premises in question, or any and what part thereof.

This case was argued on a former day in this term, by *Copley*, Serjt., for the Plaintiff, and *Hullock*, Serjt., for the Defendant. As the Court in giving judgement went fully into their principal arguments, it is deemed unnecessary here to repeat them. Besides the cases mentioned in the judgement, the following authorities were referred to: *Dyer*, 23. b. pl. 146. 1 Co. Litt. 111. 1 Ro. Abr. 618. B. pl. 2. l. 47. *Garrett v. Lister*, 1 Lev. 25. 1 Lev. 215. *Cheyney and Smith's case*. Co. Dig. Administration, C. 5. p. 342. *Dyer*, 277, b. pl. 59. *Plowd.* 520. *Welcden v. Elkington*.

The Court took time to consider, and on this day their judgement was delivered by

GIBBS, C. J. This was an ejectment on several demises, brought against *W. Sturges*, who claims under a lease granted by one of several executors. There are six demises in the declaration, but the title of none of the lessors can prevail, if that lease be good. After stating the devise, his Lordship added, it is not necessary for me to go through the title of the lessors of the Plaintiff, because we think the Defendant is entitled to our judgement; for that his title is well supported by the lease granted to him by the indenture of 7th July 1791. [here his Lordship stated the lease and then resumed]. On the decease of *S. Hayes* the elder, *S. Hayes* the younger, and two others, took the estate as his executors named in his will; and it is evident that this lease, under which the Defendant claims, is not justified by the leasing power in the will of the first testator. If, therefore, the lessor be considered as acting under that leasing power, as a

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mere tenant for life, that lease will be bad; but in order to give effect to the legacy, it *is necessary that the executors should assent to it. If, indeed, this can be considered as a lease, granted by the executors, it may be supported. The question therefore is, whether there be any assent to this legacy. *S. Hayes* the younger, is a legatee for life only. It is clearly settled, that where an executor takes an interest in a leasehold estate for his life, he must do something more than enter, in order to give assent to his legacy; but where his interest is absolute, his entry does assent to the legacy: there is a substantial reason for this distinction; for if his general entry on his life estate were an election to enter as legatee, it would necessarily confirm the remainder devised over; and that might happen in cases wherein he might want the estate in remainder for sale, in order to pay the testator's debts; such an assent would be a *devastavit* in the executor, which might be a grievous hardship to him. If the devise to him be absolute, the same reason does not exist; for he has the value of the whole term, as an equivalent, to indemnify himself against the consequences of the *devastavit*. If it were necessary to cite cases, they are *Lampet's* case (a), and *Pannel v. Fenn* (b), *Ro. Abr. Devise* (c). Notwithstanding, therefore, that *S. Hayes* entered on this land, he must be taken to have entered as executor, and not as legatee, unless there be other evidence of his assent to the legacy. I agree, that there may be an implied assent to a legacy, manifested by other acts, as strong as if the executor had said, "I assent to this legacy;" and it is contended, that in this case there is such evidence. For it is said, though, where one executor is a legatee for life, his entry does not show an assent to the legacy to himself for life; yet, where there are several executors, if the one who is legatee enters, it is an assent. We cannot subscribe to this distinction; for one of the several executors may administer alone, and then he must enter. Again, there is no doubt that a lease by one executor is good, though there are other executors; and therefore his making this lease in his own name only, which, as well as the reservation of rent to himself, his executors, and administrators, is much relied on by the Plaintiff's counsel, is no proof that in so doing he was acting as legatee: and though he was exceeding the proper and regular bounds of his power as a trustee, and his duty as executor, that does not

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(a) 10 Go. 47. b. 5th res.

(b) Cro. El. 347.

(c) p. 619. Devise, D. pl. 1.

avoid the lease, nor does it show that he was acting as legatee. Nothing would be evidence of that last, but what could be done in his proper title and character as legatee. This lease is no more conformable to his title as legatee, than it is to his character as executor; and it is not enough to show that it is equally applicable or equally inapplicable to his title of legatee, as to his character of executor; but it must appear, that he did the act, rather in the character of legatee than in that of executor. I agree to the cases which say, that without an express indication of the executor's intention to take as legatee, he shall be in only as executor; but none of the cases say, that an act, such as a lease, which is inconsistent with the duty of an executor, is evidence of an assent to a legacy, unless it be consistent with the character of legatee. Of the cases in which the executor has been held to have made an election to take as legatee, the first is *Paramour v. Yardley* (a), from *Plowden*, and it was insisted there, that there was no assent to the legacy; but there was evidence enough of such assent; for the proof was, not only that the widow took the property, but educated the children of the testator, as was directed by his will, and it therefore must be inferred, that she assented to the legacy. So, in *Young v. Holmes* (b), it was argued that no assent was shown to the legacy, but when it was shown that the executor had paid a charge of 50*l.* to which the legacy was subjected, it was held that was a sufficient proof of his assent to the legacy. The principle established in these, and all the cases cited, is, that if an executor, in his manner of administering the property, does any act which shows that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy; but if his acts are referable to his character of executor, they are not evidence of an assent to the legacy. We think there is no such evidence here. It is objected, that his will, whereby the lessor devises over the property, furnishes evidence that he took it as legatee; and it is said to be established by an authority in *Wentworth* (c), that a devise over by an absolute devisee shows his assent, but no case decides that a devise over, by a tenant for life, of that which he cannot give, is such evidence. But further than that, the evidence must be of an assent to the legacy at the time of making the lease, and his will, made after, cannot prove that he assented to the legacy at the date of the lease. We are

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(a) *Plowd.* 539.(b) 1 *Str.* 70.(c) 225. *Margin.*

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therefore of opinion, that there is in this case no evidence of the assent, by *Samuel Hayes* the younger, to this legacy: he must therefore be considered to have leased as executor, and a verdict must be entered

For the Defendant.

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BUNN and Another v. MARKHAM and Others.

A person supposing himself in *extremis* caused India bonds, Bank notes, and guineas to be brought out of his iron chest, and laid on his bed; he then caused them to be sealed up in three parcels, and the amount of the contents to be written on them with the words "for Mrs. and Miss C.," the Plaintiffs; he then directed the brother to replace them in the iron chest, to be locked up, the keys to be sealed up, and directed "to be delivered to J." (his solicitor and one of his executors) after his decease, and replaced in his own custody near his bed, and afterwards spoke of this property as given to the Plaintiffs: Held this was not a *donatio mortis causa*, for want of a sufficient delivery, and continuing possession.

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THIS was an action of trover, brought to recover from the Defendants who were the executors of Sir *Jervase Clifton*, Bart. deceased, certain *India* bonds, bank notes, guineas, an iron chest, and the boxes and envelopes in which these securities and money had been contained. The cause was tried at *Guildhall*, at the sittings after *Trinity* term, 1816, before *Gibbs*, C. J. The evidence was, that Sir *Jervase Clifton*, being of an advanced age, and confined to his bed, and having by his will, dated in 1814, bequeathed all his cash, notes, and *India* bonds to his executors, to be sold and invested in trust for his daughter, the wife of the Defendant *Markham*, and her children, on 24th *March*, thinking himself near his end, sent for his solicitor, the Defendant *Jamson*, to make a codicil to his will, whose partner *Leeson* attended him, and prepared a codicil, by which the testator gave to the Plaintiff *Mary Bunn*, otherwise *Clifton* (who had for more than thirty years cohabited with him, and was the mother of the other Plaintiff) 2000*l.*, and to his and her daughter, the Plaintiff *Rebecca Clifton*, the like sum of 2000*l.* While the solicitor was in the house, the testator taking some keys from a basket which he always kept by his bed-side, delivered them to *John Bunn Clifton* (his son by the one, and the brother of the other Plaintiff), *Leeson*, and a tenant named *Sandby*, in whom he reposed great confidence, and directed them to go to an iron chest in which he kept his valuables, fixed in the wall of another room in his house, and to bring from it whatever property they found there. They brought three parcels, *and laid them on his bed, one of which contained three *India* bonds, value 1500*l.*, and bank notes, together of the value of 2225*l.*, another contained 1100*l.* in bank notes, and the other contained 479 guineas, the value of the whole being 3829*l.* The testator, on being informed that the amount was about 170*l.* short of 4000*l.*, said it should

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be made up to 4000*l.* even money, and directed for the Plaintiffs, 2000*l.* for each; but the complement was never in fact added. On the box which contained the 2225*l.*, Mr. *Bunn Clifton* had before, on the 7th of *March*, by the testator's direction, written "For Mrs. and Miss *Clifton*, 504*l.*" The other two parcels, Mr. *Bunn Clifton*, by his father's direction, on the present occasion sealed up and wrote on them the words, "For Mrs. and Miss *Clifton*." The testator charged Mr. *Clifton*, that after his decease he should deliver these to his mother and sister, the Plaintiffs. Mr. *Clifton*, by his father's direction, replaced this property in the iron chest, locked it, and brought back the keys, which *Leeson*, by the testator's direction, sealed up in a paper parcel, and wrote thereon, "To be delivered to Mr. *Jamson* after Sir *Jervase Clifton's* decease." The keys were then again put into the basket by the testator's bed-side. The Plaintiffs were not then in the house, but upon Mrs. *Clifton's* arrival some days after, the testator intrusted to her the keys of the iron chest, and told her that the contents were to be her's and her daughter's, and charged her to keep the keys; and many times afterwards, and particularly on 27th *April*, on the occasion of his making a further codicil, he declared that the money in the iron chest was for the Plaintiffs. After this time, the testator frequently expressed anxiety respecting the keys of the iron chest, and required them to be shown him, and on learning that they had been obtained from Mrs. *Clifton* by his eldest son, he expressed great displeasure, and caused the keys to be replaced in the basket of keys which was always kept in his bed-room. The parcels, and the property therein, continued in the same state until after the testator's decease, which happened a year afterwards. *Gibbs*, C. J., left to the consideration of the jury the probability that the intended 4000*l.*, of which the testator had spoken, was the same sum designated by the codicil of 24th *March*; and also the question, whether the testator meant to make this an absolute gift to the Plaintiffs, or only provisional, upon the probability that he might not survive long enough to complete the codicil. The jury found that this was not the 4000*l.* designated by the codicil, and that the testator intended it as an absolute and not a provisional gift. His Lordship reserved the point, whether there had been in this instance such a sufficient delivery of the property, as was necessary to constitute a *donatio mortis causâ*.

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1816. *Shepherd*, Solicitor-General, in this term obtained a rule *nisi* to set aside the verdict, and have a new trial, upon two grounds, first that the verdict of the jury was contrary to the weight of the evidence; secondly, that there was not a sufficient delivery to constitute a *donatio mortis causâ*.

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Best and *Blosset*, Serjts., showed cause. The evidence, they contended, was most clear, as to the testator's intention to make this an absolute donation *causâ mortis*. And as to the point of law, this was a sufficient delivery, or rather, an actual delivery was not necessary. In *Spratley v. Wilson* (a), *Gibbs*, C. J., held it sufficient where a person *in extremis* said, "I have left my watch at Mr. R.'s at *Charing Cross*, fetch it away, and I will make you a present of it." [*Gibbs*, C. J., desired that case might be laid out of the consideration of the Plaintiff's counsel, for that immediately after that trial, he perceived that what he had somewhat improvidently thrown out, could not be maintained, because a delivery was wanting, and he had accordingly written a remark to that effect at the end of his own note of the case.] The only requisite for a *donatio mortis causâ*, is, that it be intended to take effect upon the decease of the donor, and be accompanied by some overt act, which needs not to amount to a delivery. It may be inferred that this was Lord *Loughborough's* opinion, from his expression in the admirable judgement which he delivered in *Tate v. Hibbert* (b). "It is clear it could not be by mere parol, because saying 'I give' without any act, will not transfer the property. So far I concur with the reasoning in that case:" referring to the judgement of Lord *Hardwicke*, Chancellor, in *Ward v. Turner* (c). In *Smith v. Smith* (d), no delivery took place: the donee was the donor's servant, left in custody of his goods during his absence, which was a continuing possession in the master. The delivery needs not to be to the donee in person; a delivery to any other for his use is sufficient. The testator, in the present case, separates this from the residue of his property, shuts it up by itself, indorses it by the hand of an agent in his own presence, gives it over into the hands of the Plaintiff's son, and tells him, after the donor's decease, to deliver it to his mother and sister. That then was a sufficient transmutation of the possession. If it be said that the property came back to the testator's

(a) 1 *Holt*. 10.

(b) 2 *Ves. jun.* 111. 120.

(c) 2 *Ves.* 431.

(d) *Str.* 955.

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possession, by being put back into his iron chest, the answer is, first, that it was only imperfectly restored to him, for the seal is never afterwards broken off; next, in *Smith v. Smith*, so did it revert on the testator's return from the country. *Here a mark is put on the property, which never is again taken off, but is found remaining after the donor's decease. The only use of a delivery, is, by some act to remove the doubt that might exist on the use of mere words; such an act exists here, and therefore all is done which is requisite for a complete *donatio mortis causâ*. Both the civil law, from which the *donatio mortis causâ* is borrowed, and the *English* law, alike require only a demonstration of the sentiment of the party; and the sentiment cannot be more strongly expressed than in this instance. Nay, this amounts almost to a testament in writing, by the written declaration of the party. The donor was bound by the strongest moral ties to provide for both the Plaintiffs. So, in *Hill v. Chapman* (a) the testator said, on making a new will, "The old will is of no use to me, but you must take care of it, by reason, you know, there is something with it for yourself. As soon as I am dead, open the paper and take it out;" and this was held a good *donatio mortis causâ*. If it be urged that the bank-note in that instance was committed to and remained in the donee's custody, yet he had, under those instructions, no right to open it while the donor lived. No case except *Ward v. Turner* requires the complete and absolute possession. So, *Drury v. Smith* (b). The donor gave a bank-note to A., to be delivered over to his nephew, in case he should die of that sickness. It can make no difference that it is in custody of the father himself: considering the relation that existed between him and the Plaintiffs, his was the safest and properest custody. A continuing possession in the donee is not necessary in a *donatio mortis causâ*. That is not necessary even in a gift *inter vivos*. In every *donatio mortis causâ*, the control and dominion over the gift, during the life of donor rests with the donor; for it is agreed that he has the power to revoke that disposition, and make another during his life, and give it to some other person; therefore it is improbable and unreasonable to expect that he should wholly give up the possession, in losing which he may lose the control over it. The definition in *Vinnius* which Lord *Loughborough*, Chancellor, in *Tate v.*

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(a) 2 Bro. Cha. Chas. 613.

(b) 1 P. Wms. 404. b.

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Hibbert, says is the best, makes it clear, that the donor has a greater interest in the gift than the donee (a). *In summâ, mortis causâ donatio est, cum magis se quis velit habere, quam eum cui donat, magisque eum cui donat, quam hæredem suum.* In *Hawkins v. Bluett* (b), Lord Kenyon, C. J., is said to have stated that the donor must part with the dominion of the gift, but that, and all *dicta* of Judges, must be taken with reference to the case under judgement. There the question was, whether there was not a mere bailment for safe custody, and the jury found that it was a bailment, and evidenced by the supposed donor often calling, taking some of the clothes, and wearing them. *Miller v. Miller* (c) was a mere gift by parol of every thing, exclusive of the bank-notes and the bill of exchange, all the other articles being absent; and even the bill of exchange would have been a good donation, except that, from its particular nature as a chose in action, no property could pass by delivery, and it must be sued in the name of the executors. In *Snellgrove v. Bailey* (d), cited with approbation in several books (e), Lord Hardwicke decided that a bond may be the subject of a *donatio mortis causâ*; and so may *India* bonds. In *Ward v. Turner* there was no question on the degree or nature of the delivery that would make a *donatio mortis causâ*. In that case, the subject of donation was a variety of articles, of which the first was a receipt for a *South Sea* annuity, and the rest were not present; and it is with respect to that case, that Lord Hardwicke lays down the rule, that a delivery is necessary to perfect a *donatio mortis causâ*; but he also adds, that something tantamount may be sufficient. In that case, however, there was no act at all approaching to it; and it does not therefore follow, that the observations of Lord Hardwicke, made in that case, would have been made in this case. In *Tate v. Hibbert* there was no doubt of the delivery, and the question was, not whether there was not enough to amount to a *donatio mortis causâ*, but whether there was not enough to make it a gift *inter vivos*. The Lord Chancellor held that the check on the banker was a present gift, if any thing, for it is an authority to the banker to pay, which authority would be revoked by his death. He says a *donatio mortis causâ* cannot be by mere parol, it may be by deed or writing. As to that part of

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(a) *Justin. Inst. lib. 2. tit. 7. de Donationibus.*(b) 2 *Esp.* 662.(c) 2 *Fez.* 442. 1 *Ves. jun.* 546. 4 *Bro. C. C.* 72.(d) 3 *P. Wms.* 356.(e) 3 *Atk.* 214.

the case which relates to the revocation by the gift in the codicil, the jury have put that out of consideration by their finding: it is plain on the evidence, that the testator, after completing the codicil, acknowledged this as a subsisting gift. It would however be extremely difficult to argue, that a codicil, merely confirming a will, would defeat a *donatio mortis causâ* made since the will, which had taken the property out of the operation of the will.

Shepherd, Solicitor-General, and *Copley*, Serjt., who were to have supported the rule, were relieved by the Court.

GIBBS, C. J. The two grounds on which the present application is made, have a different object in view. The one is, that the jury did not draw a correct conclusion from the facts submitted to them: the other is, to enter a nonsuit, on the ground that the facts, taking them to be proved, do not make out the title of the Plaintiffs. The first question stands principally on the evidence of *Mr. Bunn Clifton*. If his memory has not failed him, the verdict is certainly right, and his credit and character stand unimpeached. I say this, in justice to a young man whose character is his best possession. As to the other points, it is agreed on all hands, that a *donatio mortis causâ* cannot exist, without a delivery. The facts of this case are, that the property was taken out of a chest of the testator, looked over by him, and sealed up in three different parcels: being so sealed, he declares that it is intended for the witness's mother and sister, and directs that it shall be given to them after his decease; there is no other delivery but that: it is replaced in the chest, and the keys are re-delivered to the testator, or by him to persons whom he always nominates as his servants for that effect, and he expresses a continual anxiety about the custody of the keys. The question is, whether this be a sufficient delivery to make a *donatio mortis causâ*; and we are clear that it is not. It is argued by the counsel for the Plaintiffs, that there needs not to be a continuing possession in the donee; but that the donor may resume the possession without determining the gift. There is no case which decides that the donor may resume the possession, and the *donatio* continue. *Smith v. Smith* is a very confused case. Where the master died, it does not appear: inasmuch as it is stated that the master delivered the keys of his rooms to his servants when he went out of town, probably he died in the country, and then the delivery of the keys last made to his servant, would be a continuing of possession up to his decease.

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But all the cases agree, that if the *donor resumes the possession, it ends the gift. Lord *Mardwicke* expressly so holds in *Ward v. Turner*, where it suited the purpose of the counsel to argue (a), that if the donor, after making a complete delivery, receives back the article, the donation remains perfect. Lord *Hardwicke* immediately denied that proposition, and held, that if the possession of the donee do not continue, the gift is at an end. Seeing, therefore, that it is in the power of the donor at any time to revoke the donation before his death, and that there must be a continuing possession of the donee after the delivery to the time of the donor's death; seeing too, here, that there is neither a delivery, nor a continuing possession, we are of opinion that no interest in this property passed to Mrs. and Miss *Clifton* under the supposed delivery to the son for the use of his mother and sister; and that therefore a nonsuit must be entered.

DALLAS, J. I am of the same opinion. The facts of the case denote an intention only: there is an indorsement of the names of the mother and daughter on the paper; but they denote the testator's intention only. The property is disposed in a chest belonging to the testator; he retains the key; he does not even deliver it to the persons for whom the contents were intended. If he had chosen to take out the bank-notes the next day, and dispose of them to another, it was competent for him so to do. The donor, therefore, never divested himself of the possession for a moment, and therefore this is not a *donatio mortis causâ*.

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PARK, J. concurred. Both by the civil and by the *English* law, in this kind of *donatio* there must be an act of delivery. Even in that strongest case of *Smith v. Smith*, Lord *Hardwicke*, C. J., held that there must be an act of delivery, to constitute a gift: here is not only no evidence of a delivery, but the evidence is against a delivery; for the testator states that it was to be delivered at a future time; in addition to this, the donor gets the keys, and is offended if any other gets the keys: neither is there a continuing possession, which is necessary.

BURROUGH, J. The son had no authority whatever to deliver over these articles into the hands of his mother, and if he had no such authority, it was not a *donatio mortis causâ*. In *Burn's Ecclesiastical Law*, all the cases are collected: they all indicate, that there must be a delivery either to the donee himself, or to some one else for the donee's use: here is no such delivery, and therefore a nonsuit must be entered.

Rule absolute.

(a) 2 *Vez.* 433.

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WILLIAMS and Another v. GREGG.

Nov. 27.

BLOSSET, Serjt., had obtained a rule *nisi* to set aside an interlocutory judgement for irregularity, with costs, upon the ground that the Defendant had been served within the liberties of the cinque ports by the sheriff of *Kent*, with common process, upon a *capias* directed into *Kent*.

Copley, Serjt., endeavoured to show cause, upon the ground that the breach of franchise, though it gave to the lord of the franchise his remedy against the sheriff, yet did not impair the legal effect of the act of the sheriff, if the franchise were within his county. He also urged that, as a *latitat* in the Court of King's Bench *may be served in any county, and the service be good, although here a *capias* which is directed into one county cannot be well served in another, according to the case of *Willis v. Pendrell* (a), yet the reason of that is, because it generally happens that different filazers prepare the writs of *capias* into the different counties; but here it happened, that the same officer, in fact, issues the writs of *capias* into *Kent*, and into the liberty of the cinque ports.

Lens, Serjt., for *Blosset*, in support of the rule, urged that this was not a mere breach of franchise. "The cinque ports are parcel of the county of *Kent*, and yet *ubi breve domini regis non currit* (b)." And "there is a diversity between a franchise to demand conusance, and a franchise *ubi breve domini regis non currit*: for in the first case the tenant or defendant shall not plead it, but the lord of the franchise must demand conusance, but in the other case the Defendant may plead it to the writ (c)." This, therefore, is not a mere violation of a franchise, but is irregular in the sheriff.

Per Curiam. With respect to *latitats*, the rule in the Court of King's Bench is, that a *latitat* into one county may be served in another; in this court a *capias* into one county cannot be served in another, because they are made out by different officers, and it would make considerable confusion, if a writ issued into one county might be served in another. This is a *capias* issued to the sheriff of *Kent*, whose service of it in the cinque ports is

A *capias* directed into one county cannot be regularly served in another county, although it happen that the same officer is filazer for both counties.

So, a *capias* directed into *Kent* cannot be well served in the cinque ports.

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(a) 2 New Rep 197.

(b) 4 Inst. 223.

(c) 4 Inst. 224.

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wholly irregular, because he has no authority there; but, in fact, a *capias* into the cinqueports, and a *capias* into *Kent*, are prepared by the *same officer (a). We think it is, however, the safer course to keep the counties distinct, and the rule, therefore, must be made absolute (b).

(a) But where the same officer is filazer of two counties, one affidavit of the cause of action has been held sufficient to warrant a *capias* into each county. *Boyd v. Durand, ante*, II. 161. 166.

(b) " But a judgement given here of lands in the cinque ports is good, if the privilege be not pleaded, for they be part of the county, and the franchise may be demanded in another action." 4 *Co. Inst.* 223.

Nov. 27.

HORSLEY and Wife v. WALSTAB.

If a Plaintiff swears positively to a bailable cause of action, the Court will not try upon affidavits whether the transaction be such an one whereon no legal debt can arise.

A Plaintiff having obtained bail to his action, sued in equity for the same cause, and being put to his election by the Court of equity, elected to proceed there, and a perpetual injunction went not to proceed at law: Held that this was no ground for discharging the recognizance of the bail.

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BEST, Serjt., on a former day in this term, moved to discharge the Defendant out of custody, who had been held to bail for 4000*l.*, money had and received to the use of the Plaintiff's wife, on an affidavit that the debt arose for a legacy due from the Defendant, in his character of executor to a person deceased in the Island of *Demerara*, and that neither by the law of this country, nor by that of *Demerara*, of which island the Defendant was a native, could an executor be arrested for a debt due from him as executor.

Per Curiam. The Defendant is contesting the fact sworn in the affidavit, to hold to bail; and it is a rule of this Court, that where a Plaintiff swears that another is indebted to him, this Court will not try on affidavits, whether there be a debt due or not; for supposing that we were convinced that the Plaintiff was acting under a mistake in so swearing, yet we cannot discharge the Defendant, without taking upon ourselves to decide that there was no debt. If to-morrow you can produce any instance in which this has been done, we *will hear it. In a case which occurred on the Western circuit, in which *Rooke*, Serjt., was of counsel, where a man took on himself to arrest in trover for 10,000*l.* on account of the enormity of the case, this Court interfered and discharged him; but I remember that it was thought a great stretch of the authority of the Court.

The application was not renewed.

Best had since obtained a rule *nisi*, that all further proceedings

ings in this action might be stayed, and that the bail in this action might be discharged from their recognizances, the Plaintiffs having elected to proceed in their suit in equity in this matter. He moved this upon an affidavit that the Plaintiffs had filed their bill in Chancery against the Defendant and *Hardess*, praying a discovery of property in the Defendant's hands, alleged to belong to the Plaintiffs, and an account thereof, and that the Defendant might transfer the same to the Plaintiffs' direction; that the Defendant had put in his answer, and *Hardess* had demurred; that in this term, upon the Defendant's application to the Court of Chancery, that Court upon an allegation that the Plaintiff prosecuted the Defendant at law, and in that Court, for one and the same matter, whereby the Defendant was doubly vexed, ordered that the Plaintiffs should, within eight days after notice, make their election in which court they should proceed, and if they would elect to proceed in Chancery, then the Plaintiffs' proceedings at law were stayed by injunction; and in default of election, or if the Plaintiff should elect to proceed at law, then the Plaintiff's bill should be dismissed; and that the Plaintiffs had elected to proceed in equity.

Shepherd, Solicitor-General, now showed cause against this rule, as an unheard-of application.

Best, in support of his rule. The Plaintiff is not entitled to keep this recognizance hanging over the bail for an unlimited period, nor can he make the bail answerable for an equitable claim: the Plaintiff has filed his bill for the same cause of action.

GIBBS, C. J. We cannot grant this motion: if the Plaintiff takes any step against the bail, or against the principal in this case, which the Defendant thinks cannot be supported, he will make his application to the Court accordingly.

Rule discharged.

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COPPIN v. WALKER (a).

Nov. 25.

THIS was an action for goods sold and delivered. Upon the trial of the cause at the *Northumberland* summer assizes,

If an auctioneer
sells goods and
delivers them,
without notice

of any lien or claim which he has on the owner, and the buyer, without such notice, settles for the goods with the owner, the auctioneer cannot sue the buyer for the price of the goods.

So, if the auctioneer sells the goods of *B.* as the goods of *A.*, and the buyer, without notice, takes the goods with the auctioneer's assent, and pays the price of them to *A.*, the auctioneer cannot afterwards maintain an action for the price.

No implied contract to pay arises on the auctioneer's giving up his lien by delivery of the goods.

(a) On this day *Gibbs*, C. J., was absent in consequence of indisposition.

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1816, before *Wood, B.*, the case was, that the Plaintiff, being an auctioneer, was employed to sell by auction the goods of *Appleton*, in *Appleton's* house, and he printed and published a catalogue, entitling the goods as *Appleton's* goods, and he entered them all at the excise office, without distinction, as *Appleton's* goods. The defendant was the holder of a bill of exchange for 31*l.* 11*s.* accepted by *Appleton*, due and unpaid; he attended the sale, purchased articles amounting to 23*l.* 12*s.* 8*d.* obtained the goods, and before any notice or demand made by the Plaintiff, went to *Appleton*, who set off the amount thereof against the bill, and paid the Defendant the balance, who thereupon gave up the bill. Certain of the articles which he had purchased, to the value of 17*l.* 15*s.* were, however, the goods of *Appleby*, and had been included in the sale by the Plaintiff, without the privity of *Appleton*, or of the Defendant, who supposed he was buying the goods of *Appleton*. The Plaintiff insisted on payment to himself for all the goods, which the Defendant refused. The Defendant had since released *Appleton*. The jury, under the direction of *Wood, B.*, found a verdict for the Plaintiff for 23*l.* 12*s.* 8*d.*, with liberty to the Defendant to move to enter a nonsuit, or reduce the verdict to 17*l.* 5*s.*, the amount of *Appleby's* goods.

Accordingly *Bosanquet, Serjt.*, having in this term obtained a rule *nisi* to that effect,

Hullock, Serjt., showed cause. A purchaser from an auctioneer must settle with the auctioneer, under whom he derives title to those goods. An auctioneer is not a mere agent: he is bound by law to pay the auction-duty, he has a lien on the price of the goods sold, for that duty, and for his commission. This is an action for goods sold and delivered: it is sufficient, to entitle the Plaintiff to recover, that the Plaintiff sold the goods to the Defendant. An auctioneer has a lien. 'Wherever a person has a lien for the proceeds of goods, he is more than a mere agent: and may maintain an action for goods sold and delivered: for he has a special property. *Williams v. Millington (a)* establishes two propositions; 1. That an auctioneer has a special property in the goods; 2. That he may sustain this action. There, goods were sold on the owner's premises, and known to be so. The buyer, having packed the goods in a cart, paid the auctioneer the owner's receipt for five guineas, and the balance in cash; and while the auctioneer was hesitating whether he should receive it, the Defendant drove off the goods: and though Lord *Loughbo-*

(a) 1 *H. Bl.* 81.

rough, C. J. said, "he shall not avail himself of this trick," yet he went into the consideration of the rights of an auctioneer. *Wilson*, J. who at first did not quite concur, finally agreed in the judgement. If the law were not so, an auctioneer might often be defrauded. And though it may be urged that by parting with the possession of the goods he lost his lien, yet a new contract arose on the auctioneer permitting the Defendant to take away the goods. A new contract often arises from the acts of parties; as in *Cock v. Taylor* (a), where it was held that a right of action arose for the master of a ship against the assignee of the bill of lading, upon delivery to him on demand, of the goods, without freight; and that doctrine has been since confirmed in this Court. On the same principle, the Defendant's act of taking away the goods, knowing that they were not paid for, raised an implied promise to pay for them. The auctioneer had the legal possession of the goods at the time, and the Defendant could not take them without deriving title from him. *George v. Clagget* (b) and *Rabone v. Williams* (c), cited at the trial, do not apply; nor does *Winch v. Keeley*, (d) which was cited by *Copley*, Serjt., on motion for a new trial in *Coppin v. Craig* (e). If *Williams v. Millington* does not carry the law to the full extent of the verdict, yet upon what principle is it, that the Plaintiff is not to recover for those goods which were not *Appleton's*? The misrepresentation that they were *Appleton's* goods, does not transfer the property to *Appleton*, nor enable him to pay his debt with the proceeds of another man's goods. Suppose *Appleby* had sued the Defendant, would it have been any bar, to say the goods were sold as *Appleton's*? The only possible consequence is, that if the buyer had sustained any injury by the misrepresentation, he might have had a special action against the auctioneer. What answer would it be to an action by *Appleby* against the auctioneer for the proceeds of his goods, that the buyer had paid for them to the person on whose premises they were sold? That part of the verdict could not be sustained, unless it could be shown that a mere naming in a catalogue operates a transfer of property. The entering the goods in the excise in the name of *Appleton* can operate no more than entering them so in the catalogue: the entry there is *diverso intuitu*, that the crown may the more easily transact the business of the auction duty, than if there were more numerous entries. At every place of sale in

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(a) 13 *East*, 359.(b) 7 *T. R.* 359.(c) 7 *T. R.* 360. n.(d) 1 *T. R.* 619.(e) *Post*, 243.

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v.

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this town, under an auction of the goods of one man, the goods of many are daily entered. The verdict, therefore, is, on the authority of *Williams v. Millington* and *Cock v. Taylor*, sustainable to the full extent; but is, at all events, sustainable to the extent of the value of the goods of *Appleby*.

[241] DALLAS, J., stopping *Bosanquet*, who would have supported the rule, gave judgement. This is an action brought by an auctioneer to recover the value of goods, which are now stated in part to belong to *Appleby*, but which he sold as the goods of *Appleton*. It is said he had a special property in the goods intrusted to him to sell. He proves to be the agent of *Appleton* and *Appleby*, and his sale belongs in part to each: but it is represented in the catalogue as wholly consisting of the goods of *Appleton*, and is so entered at the excise office, and the goods are sold on *Appleton's* premises. The Defendant is induced, probably by this representation, to become a purchaser, that he may have the opportunity to set off the price of the goods which he buys, against the bill which he held, payable by *Appleton* to him. If he is deprived of effecting this object, this misrepresentation must operate as a fraud with respect to him: he buys the goods as *Appleton's*, on the representation of the Plaintiff that they are such; he takes them away by the consent of the Plaintiff (without which he could not take them), without any demand of the price being made by the Plaintiff, or any statement that *Appleton* was indebted to the Plaintiff for commission or auction duty or any thing else. They were therefore delivered as the goods of *Appleton*, and as such, the Defendant had a right to treat and pay for them: the Plaintiff has concluded himself by his own act.

[242] PARK, J. Nothing which we decide in this case breaks in upon the authority of *Williams v. Millington*, which only decided, that an auctioneer might maintain an action in his own name. The Court thought that as circumstances there occurred, which do not occur in the case of a common agent, the action might be maintained. Here the only question is, whether the Plaintiff has by his own act and declaration authorized the Defendant to do that which is a bar to his action. The Plaintiff sells the goods in the house of *Appleton*: his declarations are, that the goods are the goods of *Appleton*: his entry at the excise is so: the Plaintiff had a clear right of set-off against *Appleton*; and the auctioneer has parted with his lien, without giving the Defendant notice of any claim which he had on the price, and therefore

therefore it would be gross iniquity to say that the Defendant is not entitled to his set-off; and the Plaintiff cannot recover.

BURROUGH, J. I entertain no doubt on this case. The goods were sold to the Defendant through the agency of an auctioneer. As between the Plaintiff and the Defendant, there was no notice that these were the goods of any one but *Appleton*: it is enough for the Court to decide on, that the auctioneer has parted with his lien. The goods are parted with without notice of any charge or claim on the part of the auctioneer. If, at the time of delivery, the Plaintiff had said, "Remember that these goods are subject to a charge for duty, commission upon selling, and the like, you must not settle with their owner," it would have been notice to the Defendant, and he would afterwards have done wrong, if he had settled with *Appleton*, without retaining those charges, but the Defendant has no notice of any thing of the sort; and I therefore think he was warranted in settling with *Appleton*,¹ and that the Plaintiff cannot recover. The rule therefore must be absolute to enter a

Nonsuit.

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v.
WALKER.

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THIS was an action brought by the same Plaintiff as in the last case, against the Defendant, who had also purchased part of the goods of *Appleby*, as well as goods of *Appleton*, at the sale made by the Plaintiff of the goods of the latter, and had received the goods, but had not paid for them. The Defendant pleaded, after the general issue, that the Plaintiff sued in trust for *Appleton*, and that *Appleton* was indebted to the Plaintiff in a larger sum, which he set off against his debt to the Plaintiff. After verdict for the Plaintiff,

Copley, Serjt., obtained a rule *nisi* to set aside the verdict and enter a nonsuit. He observed that according to the cases of *George v. Claggett* (a), and *Rabone v. Williams* (b), it had been held that the Defendant was entitled under the general issue to the equity of the statute of set-off, even if the Defendant could goods of *A*. in a sale of the goods of *B*., held that this was such a fraud, that the Defendant might set off a debt due to him from *B*. against the price of the goods of *A*.

Nov. 26.
Where an auctioneer had sold goods, and delivered them without payment, held that as he had parted with his lien, the Defendant might in an action by the auctioneer set off against the price a debt due from the owner of the goods to the Defendant.

And where the auctioneer had sold to the Defendant the

(a) 7 Term Rep. 359.

(b) *Ibid.* 360. n.

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not maintain his plea of set-off; for he admitted that the authority of the case of *Bottomley v. Brooke (a)*, on which that plea was founded, had been much questioned.

The Court intimated a doubt, whether an action did not accrue to the auctioneer, who had a lien as well on the proceeds of the sale as the specific article sold, upon an implied promise of the Defendant to pay him the price, in consideration of his foregoing his lien, and delivering the goods without payment, in analogy to the cases decided on the delivery of goods by the master of a ship without payment of freight; but they granted a rule *nisi*.

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Hullock, Serjt., showed cause, contending that at least the plea of set-off ought to be restrained to the value of *Appleton's* goods, and that the Plaintiff was entitled to succeed to the extent of *Appleby's* property.

Copley supported the rule.

The Court determined, that as they had held the clandestine insertion of *Appleby's* goods into *Appleton's* sale to be a fraud practised by the Plaintiff, he could not be heard to say that any part of the property was not *Appleton's*, and therefore the Defendant was entitled to the benefit of his set-off to the whole extent of the goods sold.

Rule absolute to enter a nonsuit.

(c) 1 Term Rep. 621. n.

(IN THE EXCHEQUER-CHAMBER.)

Anonymous.

Nov. 27.

Interest refused on affirmation in error of a judgement in an action on a judgement of a court in *Jamaica* in an action for goods sold and delivered, and interest on the price of the goods.

LITTLEDALE moved for interest on a judgement affirmed in error. An action of debt was brought in a court in *Jamaica*, for goods sold and delivered, and for interest thereon, and on an account stated, and interest on the balances. Judgement passed in that court by default. The Defendant in error offered affidavits, that in the usual course of dealing in *Jamaica*, the inhabitants were always in the habit of charging interest on

So, where the judgement in the Court below was in an action on an account stated, and for interest on the balances.

The Court of Exchequer-Chamber does not in the ordinary exercise of its discretion give interest upon the evidence of affidavits, but only on that which appears on the record,

their balances, and that in the judgement in the court below, interest was a component part of the *sum recovered. In many cases where the original transaction bore interest, this Court gave it. He only applied for interest on the principal sum recovered by the judgement in the Court in *Jamaica*, which was a precise sum; but he did not contend that he was entitled to it on the practice of this Court, but on an affidavit that the demand in the Court below was for matters, all of which bear interest. In several cases this Court had given interest on affidavits, where it did not appear on the record that the cause of action was a matter which bore interest. The officer had furnished a case of interest given on the balance of a merchant's account. Here, the first count was debt for goods sold and delivered, and lawful interest on those goods; and the judgement by default admitted as strongly, as if a jury had found the fact, that interest was due. If the Plaintiff below had declared in *assumpsit* on the judgement in *Jamaica*, he would have recovered interest in the shape of damages.

GIBBS, C. J. I am not prepared to say, that because the Courts in *Jamaica* are used to give interest in their judgements, therefore we are to give it in a Court of Error here: the cases in which this Court gives interest, are cases wherein this Court can see on the record transactions which on the face of them bear interest; but the Defendant in error brings this application before the Court only on affidavits: those affidavits may be wholly false: it is an *ex parte* application; and in the discretion which we are bound to exercise in these matters, I am of opinion this is not a case in which we can give interest (*a*).

(*a*) Wood B. was absent.

SIMPSON v. BLOSS.

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Nov. 28.

THIS was an action for money lent, money had and received, and upon the other money counts. Upon the trial of the

transaction, is capable of being enforced at law, is, whether the Plaintiff requires any aid from the illegal transaction to establish his case.

The Plaintiff laid an illegal wager with *B.*, the Defendant assumed a part in the bet. The Plaintiff won: it was expected that *B.* would pay on a certain day, before which the Plaintiff, at the Defendant's request, because he was going to a distance, advanced to the Defendant his share of the winnings. *B.* died insolvent before the day, and the bet was never paid. Held that, inasmuch as the Plaintiff could not establish his case without the aid of the illegal wager in his proof, he could not recover.

The test whether a demand connected with an illegal

cause

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cause at *Guildhall*, at the sittings after *Trinity Term* 1816, before *Gibbs*, C. J., it appeared that at the *Epsom* races, 1813, the Plaintiff made a bet of 10 guineas with Captain *Brograve*, that a mare named *Glaucina* would win the *Epsom* stakes: the Defendant advised him to increase the bet, and he the Defendant would take a share in it. The Plaintiff increased the bet to 25 guineas with Captain *Brograve*, and the Defendant assumed 10 guineas, part of that bet. *Glaucina* won; and the Defendant, being about to take a journey, requested the Plaintiff immediately to pay him the ten guineas, as his share of the sum, which, it was expected, Captain *Brograve* would pay at *Tattersall's* on the following *Monday*, the usual time and place for settling bets made at the *Epsom* races. The Plaintiff accordingly paid the Defendant the ten guineas, but before the following *Monday*, Captain *Brograve* died insolvent, and the bet of twenty-five guineas never was paid. The Plaintiff brought this action to recover back that sum of ten guineas which he had so advanced. *Blosset*, Serjt., for the Defendant, insisted, first, that the money was paid out and out. Secondly, that the bet was illegal, and therefore the money could not be recovered. *Gibbs*, C. J., suffered the cause to proceed, but reserved the last point, subject whereto the jury found a verdict for the Plaintiff.

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Blosset now moved to set aside the verdict, and enter a non-suit.

Best, Serjt., now showed cause against this rule. He contended, first, that the bet between the Plaintiff and Captain *Brograve* was not illegal. Secondly, if it was, the Plaintiff's demand on the Defendant was not illegal. The Plaintiff does not, by this action, affirm the bet; for he says the money was paid to the Defendant without consideration, and he is entitled to recover it back, unless it be shown that he has acted illegally in paying it. The cases of *Faikney v. Reynous* (a), and *Petrie v. Hannay*, (b) establish the principle, that where a transaction is not *malum in se*, but merely prohibited by statute, the illegality shall be deemed to extend no wider than the positive prohibition of the statute expresses. In *Faikney v. Reynous* the bond was clearly illegal, yet the money lent to pay it was recoverable. Here, though a bet for less than 50*l.* on a horse race may be illegal, and no action maintainable thereon, yet the statute does not render the contracts void, but only the securities. Here, too, the Plaintiff pays at the Defendant's request, which ingredient

(a) 4 Burr, 2069.

(b) 3 Term Rep. 418.

subsisted in the cases of *Petrie v. Hannay*, and *Faikney v. Reynous*, and the Court, particularly *Buller, J.*, placed much reliance on that circumstance. And in *Petrie v. Hannay* Lord *Kenyon, C. J.*, relied on the circumstance of a bond being given: the other three Judges held that it was competent to show the illegality of a bond, as well as of any other contract. Therefore, although Captain *Brograve* might have resisted the payment of his debt, yet the Defendant, who received this money in advance under the contemplation of its being repaid out of Captain *Brograve's* money cannot resist the Plaintiff's demand. There is a great difference between statutes which avoid the security, and those which avoid the contract: there is also a difference between the immediate illegal contract, and contracts collateral, that arise out of it.

Blosset, Serjt., in support of his rule, urged that though the race was legal, the bet on it was illegal, for which he cited *Alcibrook v. Hall (a)*, *Blaxton v. Pye (b)*, *Goodburn v. Marly (c)*, and *Clayton v. Dilly (d)*, where the point was given up, as too clear for argument, *Connor v. Quick*, cited by *Aston, J.*, in *Clayton v. Jennings (e)*: a MS. note of the same case is subjoined by Mr. *Nolan* in his edition of *Strange*, to the case of *Goodburn v. Marly*. As to the second question, the particular points on which the Plaintiff relies, as raised in the cases of *Faikney v. Reynous*, and *Petrie v. Hannay*, were made in all the cases next cited, and were overruled; and as to the point of request or absence of request, in *Aubert v. Maze (f)*, Lord *Eldon* entirely disaffirms the existence of any distinction on that ground. The rule is, that whenever one man advances money to another on the footing of an illegal transaction to which he is privy, in whatever relation either of them stands to the contract, and even where the Plaintiff is more distant from it than here, he cannot recover, and that, whether the party wins or loses. Here, therefore, as the Plaintiff has paid that which it was expected *Brograve* would have repaid, he cannot recover. He referred to *Steers v. Lashley (g)*, *Booth v. Hodgson (h)*, *Mitchell v. Cockburn (i)*, *Ex parte Bell (k)*.

Best replied to the cases cited. In *Steers v. Lashley* Lord *Kenyon, C. J.*, confirms *Petrie v. Hannay*. In *Booth v. Hodgson* the Court could not otherwise have decided, without rendering nugatory the act for the protection of the insuring cor-

(a) 2 *Wils.* 309.(b) *Ibid.*(c) 2 *Str.* 1159.(d) *Ante*, IV. 166.(e) 2 *Bl.* 708.(f) 2 *Bos. & Pull.* 371.(g) 6 *Term Rep.* 61.(h) 6 *Term Rep.* 405.(i) 2 *H. Bl.* 379.(k) 1 *Maule & Selw.* 751.

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1816. porations. The case of *Mitchell v. Cockburn* is liable to the same answer, that it would enforce a contract directly prohibited, whereas this action does not tend to enforce the prohibited contract.

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Cur. adv. vult.

The judgement of the Court was on this day delivered by

GIBBS, C. J., who, after stating the facts, thus proceeded:—This bet was confessedly illegal, and the Defendant insists that the Plaintiff's claim cannot be supported, because it grows out of an illegal transaction. The Plaintiff insists that his demand is collateral to that transaction, and that upon the principle established in *Falkney v. Reynous*, and *Petrie v. Hannay*, he may maintain an action for it. It is admitted in those cases, that no action can be founded upon an illegal contract; but the Court held, that he who borrowed money to pay a debt which he owed upon an illegal transaction not *malum in se*, might be sued for the repayment of that loan, though the lender knew to what purpose the money was applied, because the lender's right of action is founded altogether upon the contract of loan between him and the borrower, and derives no aid from the illegal transaction in which the borrower had originally been concerned nor is it affected by it; and they held, that in both cases the Plaintiff's claim fell within this rule. The ground of their decision was, that the Plaintiff required no aid from the illegal transaction to establish their case. Without inquiring whether these cases are broken in upon by others which followed them, I take the principle upon which they were decided, and proceed to consider whether the case before us falls within it. Here the Plaintiff pays ten guineas to the Defendant, who was his partner in the bet, upon a confidence that he shall get the whole bet of 25 guineas from *Brograve*, and not being able to do so, he seeks by this action to recover it back. How can he make out his claim, but by going into proof of the illegal transaction on account of which it is paid? He says, the payment was on a condition which has failed; but that condition was, that *Brograve*, who was concerned with the Plaintiff and Defendant in this illegal transaction, should make good his part by paying the whole bet to the Plaintiff; and it is impossible to prove the failure of this condition, without going into the illegal contract; in which all the parties were equally concerned. We think, therefore, that the Plaintiff's claim is so mixed with the illegal transaction in which he and

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the Defendant and *Brograve* were jointly engaged, that it cannot be established without going into proof of that transaction, and therefore cannot be enforced in a court of law. We also think, that the case *Ex parte Bell* is a strong authority for our present decision. The substance of that case may be very shortly stated. *Bell's* connexion with the *American* house is immaterial to the merits. *Bell* and *Scott* were concerned in an illegal partnership for insurances. *Bell* advanced large sums to *Scott*, to be applied in that concern. The question was, whether he could prove under *Scott's* commission what had not been so applied. The Court of King's Bench held that he could not, because the claim was bottomed in an illegal contract. *Bell* there supposed that *Scott* would apply the money in the illegal concern, which he did not. The Plaintiff here supposed that *Brograve*, who was a party with him and the Defendant in the illegal transaction, would pay his loss, which he did not. In neither case can the claim of the Plaintiff be made out, except through the illegal contract in which all were concerned.

Rule absolute to enter a nonsuit.

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SIMPSON
v.
BLOOM.

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TALBOT v. HODSON.

Nov. 26.

THIS was an action on a bond in 1000*l.* penalty, conditioned for payment of 500*l.* and interest as follows, *viz.* 25*l.* for one year's interest on 500*l.*, and 50*l.*, part of the principal, on the 20th *February*, 1815, and 50*l.* with interest of the residue, on the same day in every succeeding year, until the whole 500*l.* and interest should be paid. The Plaintiff suggested on the record breaches consisting in the non-payment of 25*l.* for one year's interest, and 50*l.*, part of the principal, on 25th *February*, 1815, and 50*l.* further part of the principal, with interest, on the 20th *February*, 1816. At the trial of the

If an attesting witness to a deed deny having seen the deed executed, other evidence of the execution is admissible.

Proof that a party signed a deed, which bears on the face of it a declaration that the deed was sealed by the

party, is evidence to be left to a jury that the party sealed and delivered the deed.

The attesting witness to a bond wrote the attestation without seeing the obligor execute: another person gave evidence that the obligor signed the bond, but did not seal or deliver it. Held, that the signing the bond, which purported to be sealed with the obligor's seal, was evidence to be left to the jury of the sealing and delivery, and that they, disbelieving the second witness, had properly found for the Defendant.

Upon a bond in a penalty conditioned for paying a less sum by instalments and interest, though a part only of the instalments are due, the obligee may arrest for the aggregate amount of all the instalments, and the interest accrued due before the action brought.

cause

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cause at the sittings after *Trinity* Term, 1816, before *Gibbs*, C. J., the witness whose name was subscribed, as attesting the bond, and who was the sister of the obligor, swore that the Defendant never executed the bond in her presence, but that it was brought to her into a room where the Defendant was not present, and she was desired to subscribe her name to it as a witness, which she did, and that she did not remember whether there was, at that time, any seal affixed to the bond, nor whether she was ever present when any seal was affixed. The Plaintiff then called a co-obligor, having released him; he was a bankrupt, and was the son of the Defendant. For the Defendant, it was contended, on the authority of *Phipps v. Parker* (a), that no other evidence of the Defendant's execution was admissible; but *Gibbs*, C. J., received the evidence, reserving the point; and that witness swore that though there was a seal on the bond when the Defendant wrote her name opposite to it, she never in his presence sealed it, nor acknowledged the seal to be her's, nor put her hand on it, nor delivered it. *Gibbs*, C. J., considered that the circumstance that the Defendant had written her name opposite to the seal, on an instrument bearing on its face a declaration that it was sealed with her seal, was some evidence to go to the jury of a sealing and delivery by her; and the jury, believing that this was a gross family conspiracy to defraud the obligee of his debt, gave their verdict for the Plaintiff, and found 141*l.* 10*s.* damages to be due upon the suggestion of breaches.

Best, Serjt., on a former day in this term had obtained a rule *nisi* to set aside this verdict, and enter a nonsuit, upon the authority of *Phipps v. Parker*. He observed, that though secondary evidence of the execution of an attested instrument had been since admitted in *Fitzgerald v. Elsee* (b), and *Leman v. Deane* (c), yet in the latter case *Le Blanc*, J., had not ventured to impugn the authority of *Phipps v. Parker*; with which this case precisely tallied, and *Phipps v. Parker* was subsequent to *Grellier v. Neale* (d), where the evidence had been admitted.

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Best, being now called upon with *Copley*, Serjt. to support this rule, they urged that this case did not fall within the reason of *Leman v. Deane* and *Fitzgerald v. Elsee*, for this was not the case of a bare bond with a seal to it and without an attesting

(a) 1 *Campb.* 412.
(b) 2 *Campb.* 635.

(c) 2 *Campb.* 636. n.
(d) *Peake*, N. P. Cas. 146.

witness;

witness; but here was actual evidence that no solemnities equivalent to delivery accompanied the signing of this bond. The mere wax which the attorney brings ready affixed, does not constitute a sealing, unless the party acknowledges it to be his seal. The Court have uniformly held, that the attesting witness must be called. If he says that he knows nothing of the execution, the Court will give credit to the words written, but if another witness is called who is able to correct the recollection of the first witness, and says the bond was not sealed, then it is not the Defendant's deed: here was that contrary evidence. This deed was not delivered to the Plaintiff in person. If a party executing barely gives a deed to the party taking an interest, it is a delivery, but if he delivers to a stranger, the act (*a*) must be accompanied with an explanatory declaration. The want of sealing probably may be answered by the signing opposite to the seal, which may be an adoption of the seal. Even if the jury saw cause to disbelieve the last witness, yet, inasmuch as there was no evidence that the deed was sealed and delivered, and as there was some evidence that it was not sealed or delivered, the jury were not warranted in the verdict which they had found. They probably did not distinguish between the execution of a bond, which is a technical instrument, and other writings.

GIBBS, C. J. The jury probably thought in this case that the sister and son of the Defendant gave a false colour to the transaction, for the purpose of protecting the sister of the first, and the mother of the second witness. The first swore she saw nothing of the execution, therefore she is put out of the case. It is admitted, that where an attesting witness has denied all knowledge of the matter, the case stands as though there were no attesting witness, and other evidence may be admitted. Here the attesting witness, who attests the sealing and delivery, says she saw nothing of it, and the attesting witness being thus got rid of, it is open for the jury to consider the effect of any evidence that may be adduced. *Hodson* says, the bond was signed by the Defendant; he therefore saw her sign the paper, which purports to be sealed and delivered by her. Upon all the evidence, the jury, I think, might consider whether they believed that the Defendant executed it or not.

PARK, J. The same high authority which decided *Phipps v. Parker* has since held otherwise. In the case of *Leman v. Deane*

(*a*) *Co. Litt.* 36. a. 9 *Co.* 137. *Thoroughgood's case*, 4 *Co. Dig.* 136. *Fétit*, A. 3. A. 4. from

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from *Lancaster*, *Le Blanc*, J., held the same: and there was a case at the *Old Bailey*, wherein, as three Judges on the *rota* tell me, the same doctrine was held.

BURROUGH, J. The evidence, I am of opinion, was well received, and the jury have drawn the proper conclusion.

Rule discharged.

The Plaintiff had holden the Defendant to bail upon this bond, on an affidavit that the Defendant was indebted to him in 550*l.* for principal and interest, due on a bond in the penal sum of 1000*l.*, conditioned for payment of 500*l.* and interest on certain days therein mentioned, some of which were then past.

[255] *Best* now obtained a rule *nisi* to tax for the Defendant his costs of this suit, with costs of the application, and to stay execution until payment, or to set off the amount of the costs against the judgement, upon the ground that the verdict being only for 14*l.* 10*s.* damages, the Plaintiff had not recovered the amount to which the Defendant was held to bail: the Defendant stated the bond, and swore that the Plaintiff had no reasonable or probable cause for holding the Defendant to special bail beyond the 14*l.* 10*s.*

Shepherd, Solicitor-General, now showed cause. The whole penalty is the debt in its proper sense; but, at least, the sum for payment of which the bond is conditioned is the debt. In *Cammack v. Gregory* (a), it was held, that though upon an assignment of breaches according to the statute of 8 & 9 *W.* 3. (b) the Plaintiff recover merely nominal damages, yet he is entitled to hold to bail for the whole amount of the instalments. The plea here was *non est factum*, which denies the whole debt, and the issue was upon the right to every part of it; the judgement must necessarily be for the whole debt: the statute does not alter the debt, it only suspends the execution; but it expressly directs that "the judgement shall be and remain as a further security, to answer to the Plaintiff such damages as shall be sustained for further breach."

[256] *Best*, in support of his rule, urged that this was not a judgement for the penalty; the penalty was the 1000*l.*; the oath neither accorded with the penalty, nor accorded with the instalments. The bond was conditioned to pay 500*l.* at certain periods: only 14*l.* was due, and the Plaintiff had sworn to 550*l.*, which could never in any shape become due. The statute 43 *G.* 3. c. 46. s. 3. is an extremely beneficial act, and it substitutes

(a) 10 *East*, 525.

(b) 8 & 9 *W.* 3. c. 11. s. 8.

a milder remedy in the place of indictments for perjury and actions for malicious arrest, and therefore the Court would give the popular sense to the word "recover," and limit it, not to a dry standing judgement, but to that which the Plaintiff can put into his pocket. The discharge of this rule would be attended with the consequence, that if a bond in 100,000*l.* penalty were given conditioned for payment of small sums, the obligee might arrest for the penalty.

GIBBS, C. J. We do not so decide, nor would I have that scandal thrown on the law, to have it believed that in these cases a Plaintiff may arrest for whatever sum he pleases. All that we decide is this, that the statute of 43 G. 3. does not apply to the present case, which stands as it did before that statute, for the statute gives this relief only in cases where the Plaintiff does not recover the sum sworn to: here he does recover the sum sworn to, therefore it is irrelevant to inquire whether this may be a malicious arrest.

Rule discharged.

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END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

1817.

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

HILARY TERM,

In the Fifty-seventh Year of the Reign of GEORGE III.

MEMORANDA.

DURING the whole of this term *Gibbs*, C. J., was compelled, by severe indisposition, to be absent from the Court.

In this term *William Firth*, of *Lincoln's Inn*, Esquire, was called to the degree of the coif, and gave rings with the motto, *Ung Roy, ung Loy, ung Foy*.

SHELDON and Others, Assignees of ISCHIEFFLY, v. ROSCHIRD.

Jan. 23.

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THIS cause was tried at *Guildhall* at the sittings after *Michaelmas* term, 1816, and a point was reserved. On this day, *Best*, Serjt., moved for a new *trial, but it was conceived that notice of his intention to apply had not been given two whole days before the motion to the judge who tried the cause, and the question therefore was, whether the motion could be now received. It was suggested that the rule (a) of prac-

Notice of motion for a new trial must be given to the judge two whole days before moving, as well in cases where a point has been reserved at the trial, as in other cases.

(a) *Ante*. IV. 721.; V. 86. 611.

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tice

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tice did not apply to cases where a point was reserved at the trial.

DALLAS, J. I see no good reason for the distinction; and the principle applies more strongly for giving notice in the cases of points reserved.

It was afterwards discovered that the requisite notice had been given in due time, whereupon the Court entertained the motion.

Jan. 25.

BENNET v. MOITA.

If a vessel, which in compliance with the statute 52 G. 3. c. 39. has a pilot on board, runs down another ship, an action for the injury cannot by s. 30., be maintained against the master, but must be brought against the pilot.

THIS was an action against the master of a *Portuguese* vessel, for running down the Plaintiff's ship, as the Defendant was coming up the river. Upon the trial of the cause, at the sittings after *Michaelmas* term, 1816, before *Gibbs*, C. J., at *Guildhall*, it appeared that at the time when the damage occurred, the Defendant had a pilot on board, as required by law, but there was no evidence whether the accident was occasioned by any personal negligence or misconduct of the pilot, or of any other person. *Lens*, Serjt., for the Defendant objected, that the Plaintiff could not recover, contending that the Defendant was exempted from being liable to the Plaintiff under the circumstances, by the statute 52 G. 3. c. 39. s. 30., which enacts, "that no owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any ship or vessel, or any cargo on board the same, for or by reason or means of any neglect, default, incompetency, or incapacity of any pilot taken on board of any such ship or vessel, under or in pursuance of any of the provisions of that act." *Gibbs*, C. J., held that the master was not answerable, unless it were expressly proved that the damage was occasioned by the neglect or default of the master and his servants, and directed a nonsuit.

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Best, Serjt., now moved to set aside the nonsuit, and have a new trial: he urged the manifest inconvenience and difficulty of obtaining redress for injuries of the like nature, which would ensue from this doctrine; for that the damage was occasioned by

by the Defendant's ship, was clear, but the Plaintiff can have no witness on board her, to ascertain who steers her, nor whether the mischief is occasioned by the default of the master, who ordinarily, and *primâ facie*, has the conduct of her, or by a pilot, whose being on board cannot ordinarily lie within the Plaintiff's knowledge: the Plaintiff can only show, that his ship is damaged by the misconduct of those who do steer the Defendant's ship. It is incumbent on the master of the latter, if he would protect himself, to show in his defence the fact, which must lie within his knowledge, that the pilot, whom he has on board, has given an improper direction.

DALLAS, J. It must be presumed, that the damage was occasioned through the negligence of him who has the management of the ship; and that, within the *Thames*, is by law committed to the pilot, of which fact the statute is notice to all the subjects; and it must be taken that whatever happens by the ship, in the course of that navigation, must be imputed to the pilot, unless he show that his orders were disobeyed. The Plaintiff had only to go to the *Trinity* house, to find the names of all the pilots; for they are a public registered body.

PARK, J. concurred.

BURROUGH, J. The Plaintiff would have no difficulty in the county of *Kent* to find out every man who goes on board any ship as a pilot.

Rule refused.

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v.
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KEMBLE and Others v. ATKINS and Another.

Jan. 25.

THIS was an action for not accepting and paying for certain sugars bought by the Plaintiffs for the Defendants. The Plaintiffs declared, that in consideration that they, as the brokers of the Defendants, and for certain reward to be paid them by the Defendants, would purchase for the Defendants certain sugars for a reasonable price, the Defendants undertook to receive and pay for the same; that they, confiding, purchased the said quantity from *Litt* and Co., for a reasonable price, whereof the Defendants had notice, and were requested to receive, and pay for them, but refused. The second count stated, that in consideration that the Plaintiffs had purchased

A broker of the city of *London* may recover the price of goods, which he, being employed to purchase, has bought in his own name; and it is not a breach of his bond given for duly performing his office as broker.

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v.

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for the Defendants at their request, as their agents or brokers, certain other sugars at a certain price, the Defendants undertook to receive the same, and pay the price on request, and averred a refusal to receive or pay. The third count stated, that in consideration that the Plaintiffs, at the Defendants' request, would purchase certain sugars at a reasonable price, the Defendants undertook to re-purchase the same from them, and pay them for the same, at and after the price which the Plaintiffs should have given; that the Plaintiffs, confiding, did purchase the sugars, for a reasonable price, whereat the Defendants were requested to re-purchase, but refused. Upon the trial of the cause at *Guildhall*, at the sittings after *Michaelmas* term, 1816, it was proved that the Plaintiffs were sugar-brokers and were employed as such by the Defendants, who were sugar-refiners: the Defendants had before remonstrated with the Plaintiffs against the practice of the Plaintiffs purchasing goods for the Defendants in the Plaintiffs' names. The Defendants, together with the Plaintiffs, examined some sugars belonging to *Litt* and Co., and, approving them, communicated personally with the sellers about the price, and directed the Plaintiffs to purchase them. The sellers refused to enter into a contract with the brokers for selling the sugars to the Defendants, but gave a sale note describing the sugars as sold to the Plaintiffs. The Plaintiffs sent a contract note to the Defendants, describing the sugars as bought for the Defendants, of *Litt* and Co., in the Plaintiffs' name. The Defendant wrote to the Plaintiffs, that he would not sanction such a proceeding, and desired them to signify the same to the buyer, and to demand a contract in the name of the Defendant's house. The sellers, however, issued their order, directed to the officers of the *West India* Docks, for delivery of the sugars to the order of the Plaintiffs, on which the Plaintiffs indorsed an order to deliver them to the Defendants, and sent this document to them, which the Defendants, after some time taken up in remonstrances, returned, having in vain offered, either to cancel the contract, or to pay for the goods in ready money, deducting a discount; and they refused to accept the goods, unless they were sold directly by the sellers to the Defendants. The Plaintiffs had entered the sugars in the broker's book which they kept, as "bought, for the Defendants, of *Litt* and Co." For the Defendants it was objected, that the Plaintiffs could not

recover,

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recover, having acted illegally; for that by statute (a), brokers are to be admitted to act within the city of *London*, only under such restrictions and limitations for their honest and good behaviour, as the court of mayor and aldermen shall think fit and reasonable: and by the regulations extant, framed nearly in consonance to the expired statute 8 & 9 *W. 3. c. 32.* every broker enters into a bond in 500*l.* penalty, conditioned, amongst other things, “that he shall, upon every contract by him made, declare and make known to such person or persons with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, if thereunto required; and that he shall not, directly or indirectly, by himself, or any other, deal for himself in buying any goods, wares, or merchandizes, to barter or sell again upon his own account, or for his own benefit or advantage, or make any gain or profit in buying or selling any goods, over and above the usual brokerage.” And he takes an oath “truly and faithfully to execute and perform the office and employment of a broker between party and party, in all things appertaining to the duty of the said office and employment, without fraud or collusion, to the best of his skill and knowledge.” And that this purchasing of the sugars in the Plaintiffs’ name, was a breach of their oath, a forfeiture of their bond, and a contravention of the statute: the jury, however, found that the Defendants had authorized the Plaintiffs to contract for the sugars in the Plaintiffs’ name, and gave their verdict for the Plaintiffs.

Shepherd, Solicitor-General, in this term moved to set aside the verdict and enter a nonsuit, upon the ground that the purchase by the Plaintiffs in their own name being illegal, the Defendants could not in law authorize the Plaintiffs to act contrary to their duty as brokers: their express assent to the act would not make it legal, nor enable the Plaintiffs to recover on a cause of action arising out of that illegal contract. It is not necessary that a broker should re-sell at a profit, in order to make his purchase of goods illegal. In order to avoid the difficulty of proving that the broker had made a profit upon a re-sale, a fact so easy to be concealed, the condition of the bond is penned in the alternative. It is, indeed, a breach

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(a) 6 *Ann. c. 16. s. 4.*

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to re-sell at a profit, but it is also a breach for a broker to deal for himself in buying any goods to barter or sell again, upon his own account: the Plaintiffs again sell these goods, on their own account, to the Defendants; whether it be for their own benefit or advantage, or not, is immaterial. The first count was disaffirmed by the Plaintiffs' own evidence, and though the last count was proved in fact, the law prohibits the Plaintiffs to recover on it.

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DALLAS, J. In this case the question went to the jury, whether the Defendants ever authorized the Plaintiffs to make the contract in the precise way in which it is here laid, and if the Defendants dispensed with that which is the usual duty of a broker, there is no ground of complaint. The Plaintiffs made known the name of the buyer and seller: they kept a book containing the names of all buyers and sellers; and entered the names of the parties to this contract in the book. A broker is required not to buy or sell for himself; nor did the Plaintiffs buy or sell for themselves, for the jury found that the Plaintiffs had authority to buy the sugars for the Defendants in the Plaintiffs' own name; and they did so buy them.

PARK, J. The mischief which was meant to be prevented, was the brokers' dealing as general merchants with this property, which they were to purchase as brokers; but here the Plaintiffs disclose on each side every step of the proceeding. They tell the Defendants that they have bought of *Litt* for them; they tell *Litt*, that they have sold to the Defendants; the Defendants wish the sugars to be bought in their own name, but *Litt*, for some whim or other, will not accede to it, and after the Defendants are apprised of the terms of the sale, they go and see the sugars in the warehouse, and do not then make their objection. I think there is no ground to disturb the verdict.

BURROUGH, J. I think the verdict perfectly right.

Rule refused,

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ZWINGER v. SAMUDA.

Jan. 27.

THIS was an action brought to recover the value of thirty casks of coffee, lying in the warehouses of the *West India* Dock Company, which, as it appeared upon the trial before *Park, J.*, at *Guildhall*, at the sittings after *Michaelmas* Term, 1816, the Plaintiff had purchased under the following circumstances:—*Roebuck* had previously purchased the coffee, with money advanced by the Defendant, *Abraham Samuda*, and for securing repayment, had transferred this coffee in the books of the *West India* Dock Company, into the name of *David Samuda*, in trust for the Defendant, by way of pledge. *Roebuck* afterwards, on 13th *August*, agreed to sell the copy to the Plaintiffs, to be paid for in cash on 17th *August*; and on 16th *August*, he requested the Defendant to give up to him the dock-warrants or orders for the delivery of the coffee, which the Defendant refused to do, unless he were first paid his debt; whereupon *Roebuck* showed him 1000*l.*, out of which, he said, the Defendant should be paid; but that for the sake of acquiring credit at his banker's, he wished to pay them this sum, and immediately to give the Defendant a check on them for 530*l.* the amount due to him. The Defendant acquiesced, and took the check, and wrote at the foot of the delivery notes his signature to an order for delivery of the above-mentioned goods to —, and gave them up on the same day to *Roebuck*, who on the 16th received of the Plaintiffs the price thereof, and delivered to them the delivery notes, to be filled up by themselves with their own or their agent's name, as the party to whom the goods were to be delivered. The check which the Defendant had taken, *Roebuck* immediately instructed his bankers not to pay: upon its dishonour, the Defendant, before the delivery notes had been presented at the *West India* Docks, gave notice at the Docks, and caused the delivery to the Plaintiffs, who on 19th *August* demanded the goods to be stopped. The Plaintiffs insisted that the property of the coffee was vested in themselves, by the indorsement to them of the delivery note, for that such

The pawnee of coffees lodged in the *West India* Docks, and entered there in the pawnee's name, gave up to the pawnor, certain delivery notes thereof called Dock-warrants, having indorsed them with an order for the delivery of the goods to —, in exchange, not for cash, which he might have had, but for a check for the debt on the pawnor's banker, which check was dishonoured: the pawnor having contracted to sell the goods to the Plaintiffs, received payment for them, and gave to the Plaintiffs the delivery notes, with the blank above the Defendant's signature for the name of the person to whom they were to be delivered.

Held, 1. That the Defendant having entrusted the pawnor with his signature to a blank, purporting, to authorize the delivery of the goods, and

enabled him thereby to induce faith to a contract for the sale of the goods, and to obtain payment for them from the Plaintiff, it must be considered that the contract of sale was the Defendant's contract, and the payment, a payment to the Defendant.

2. The Court (*Park, J.*, dissentiente) guarded against any inference that, according to a practice which has obtained since the erection of the *West India* Docks, an indorsement on these delivery notes or Dock-warrants was, of itself, and without making the wharfingers parties to the order, capable of transferring any property in the goods therein described.

was

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was the custom of this trade, established ever since the *West India Docks* had been formed, and he proved that the practice does prevail, of transferring these documents from hand to hand, by indorsement, as a symbolical delivery of the property, to which the officers of the *West India Docks* pay attention, and give effect: for that, upon the request of any holder of such delivery notes, the *Dock Company* will substitute for them new notes, deliverable to the holder of the old notes: it was also proved, that persons engaged in the trade, treat and consider these notes as passing the property by indorsement. The form of the notes is as follows:—

“ Warrant of Transfer.

Number of Order, 640.

Ship's Rotation, No. 32.

West India Dock Warehouse, No. 8.

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I certify that the following 5 *casks*, lot 29., of *Coffee*, imported by the ship *T.*, Captain *L.* from *S.*, entered by *H. M. & Son*, on the 25th day of *March*, 1816, have been transferred in the books of the warehouse into the name of *David Samuda*. Rent commences 26th *June*, 1816, inclusive. Dated 18th *June*, 1816.

Weighing-book,

C. Coldstream, Capt. No. 8.

No. 20. folio 164.

Entered, *S. W. Sansum*, Clerk.

Then followed a schedule of the marks and weight of the contents of each *cask*.

London, , 181

Deliver the above-mentioned goods to Mr. *Ab. Samuda*, or order.

D. Samuda.

No.

Examined and entered the day of 181

London, 19th *August*, 181

The above-mentioned goods to “ *Henry Coombe and Co.*” or order.

Ab. Samuda.

N. B. This order must be presented at the *West India Dock House*, and all charges are to be paid before the goods are taken away.”

The name *Henry Coombe* was inserted after the notes were delivered to the Plaintiff. *Park, J.*, assimilated these delivery notes, or warrants, as the witnesses called them, to bills of exchange, and bills of lading; both of which transfer property by indorsement; and under his direction the jury found a verdict for 586*l.*, the value of the coffee in *Nov.* 1816, it having risen in price since the sale.

Best,

Best, Serjt., now moved to set aside the verdict and enter a nonsuit, or, if that were refused, to reduce the damages to 523*l.* 13*s.* 5*d.*, the value of the coffee in August. He made the first application upon the ground that this delivery note, though dignified by the dock officers with the appellation of a warrant, is nothing more than an order from the owner and seller of goods to his servant the wharfinger, to deliver the goods to the person therein named. The custody of the wharfinger is the vendor's custody, and though, when the servant has acted on his master's order before it be countermanded, he is justified in the act; and though, where goods from their bulk are inconvenient for instant delivery, or for the purchaser's accommodation are continued in the same warehouse, a transfer in the wharfinger's book is held equivalent to actual delivery, and the warehouse thenceforth becomes the warehouse of the buyer; yet, where the order has never reached the servant, or wharfinger, the property in the goods is not changed by the delivery note. In *Hurry v. Mangles (a)*, Lord *Ellenborough*, C. J., says, "The acceptance of warehouse rent was a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine. This is an executed delivery by the buyer to the seller." But here the delivery was not executed, it remains executory. It is not the piece of paper which transfers the property by its own operation, but it is the act of the wharfinger, who, upon delivery of the note, pursues its directions. To change the property, there must be something more done than has been done in this case. If this paper had been barely delivered over to the warehouse-keeper, then, according to *Harman v. Anderson (b)*, the property would be transferred, but that has not been done. This instrument has no similitude to bills of lading, to which it was compared at the trial. Bills of lading, in *Lickbarrow v. Mason (c)*, were ultimately put on a special finding of the custom of merchants, but here no custom of merchants was found, nor has any custom had time to grow up, for these delivery orders are only of a few years' standing. Bills of lading were, in *Caldwell v. Ball (d)*, said to be first used for transferring of goods at sea, which were therefore incapable of an instant actual delivery; but if a man writes an order to his shopman at a warehouse in a different part of the town, to

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(a) 1 *Campb.* 452.(b) 2 *Campb.* 243.(c) 6 *Term Rep.* 131.

(d) 1 *Term Rep.* 205. By
Buller, J. 2, 16.

1817. deliver goods, that is not an instrument transferable by indorsement, and this is no more. The Defendant has this property in his hands for a valuable consideration. It cannot be taken from him without payment. *Roebuck* defrauds him, purchasing of him by a void check on a banker, but he does not thereby re-acquire the property, and therefore the Plaintiffs have purchased of a person who has no title. The second part of the application was made on the ground that the refusal to deliver on 19th *August*, being complete evidence of a conversion, and a cause of action then well vested in the Plaintiffs, their damages could not be augmented by any subsequent perseverance of the Defendant in the wrong done them.

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DALLAS, J. In this case there ought not to be a new trial. The person who enabled *Roebuck* to commit this fraud was the Defendant, by lodging these delivery notes in *Roebuck's* hand, and enabling him to go to market with them. The act of *Roebuck*, therefore, was the act of the Defendant. It is said that it would be inconvenient, if property may be transferred by these delivery notes. The best test of their convenience is the use of them, which has obtained ever since these docks have been erected. Two witnesses, very conversant with this trade, stated that there was a general practice prevalent, to receive these warrants in the market, and to pay for the goods therein specified, without going to the Dock-house to examine whether any stop was put on them. Without saying that this is such an usage as to constitute a rule of law, there is, in the particular case, enough to show that there is no foundation for the observation that the practice will be productive of inconvenience. It is enough, therefore, to say, that the persons who hold these bought notes, have given a valuable consideration for them, and that therefore they are entitled to the property.

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PARK, J. I am of the same opinion: it is the Defendant who is to blame, for sending out *Roebuck* into the world with these symbols in his hands; and the Plaintiffs, by purchasing them, obtain a right to the delivery of the coffee. As to the custom, it is asked by the Defendant's counsel, how can a custom grow up in so short a time as hath elapsed since the making of these docks? but in the *Newfoundland* (a) case, it was held, that one year was enough for a practice of trade to grow up.

BURROUGH, J. I hope it will be understood, that the Court

(a) *Noble v. Kennoway*, 2 *Doug.* 510.

does not proceed upon any thing like a custom in this case: the only use to be made of the evidence of the practice of the trade, is that put by my Brother *Dallas*: it shows that no inconvenience results from the use of these warrants. But here is a contract *bonâ fide* made: there is no misconduct in the Plaintiff, as it has been urged by the Defendant's counsel that there was, in paying before the time of the prompt: a man may, if he will, pay money before the last day at which he is bound to pay it; and here, the Plaintiff obtains possession of this document by the act of the Defendant himself: the Defendant has been paid for the goods; for *Roebuck* and the Defendant are one. He might have had his money if he would, for the Plaintiff's check in favour of *Roebuck* is paid, and who is it that credits *Roebuck*, but the Defendant? We therefore have the contract of sale, and the payment complete, which transfer the property; and though there also exists in the case this document, what difference does it make? It does not invalidate the sale. I think, therefore, there is no ground for a new trial.

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Rule refused.

The other point was rejected *sub silentio*.

MILL v. POLLON.

Jan. 28.

THIS was an action for money paid, money lent, and on an account stated. The Defendant pleaded in bar, that the Plaintiff heretofore in *Trinity* term 56 G. 3. impleaded the Defendant in the Court of our Lord the King, before the King himself, in a plea of trespass on the case on promises, to the damage of the Defendant, on occasion of not performing the very same identical promises in the declaration mentioned; and such proceedings were thereupon had in the said Court of our Lord the King, before the King himself, that afterwards, in that very same *Trinity* term, the Plaintiff, by the consideration and judgment of the said Court of the Bench, as by the record still remaining in the said Court of our said Lord the King, before the King at *Westminster*, more fully appeared, recovered against the Defendant in that plea. The Plaintiff demurred generally to this plea.

Plea of judgment recovered in an action on the case on promises, to the damage of the Defendant, is bad on general demurrer.

By the words "the said Court of the Bench," in a plea, the Court of Common Pleas shall be intended.

The

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The Court, stopping *Lens*, Serjt., who supported the demurrer, and cited *Impey v. Taylor* (a), called on

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Blosset, Serjt., to support the plea; who argued, as to the objection that the former plea was averred to be trespass on the case on promises to the damage of the Defendant, that inasmuch as the demurrer admits the truth of all matters which are well pleaded, it admitted the truth of the allegations of this plea. It was not insensible matter, that the Defendant averred: he averred that the Plaintiff sued before for the same cause, and made a blunder in his declaration, by stating that the Defendant's breach of promise was to the Defendant's damage, and obtained judgement on that blundering declaration: that judgement was erroneous, but the Plaintiff admits that such a judgement did pass for himself the Plaintiff; and so long as it is unreversed, it is a good judgement, and is a bar to a second recovery; and he cannot, by this side wind, reverse the judgement in which he, if the Defendant speaks true, as the Plaintiff admits he does, has himself blundered. As to the second point, he argued that the term "the Court of the Bench" was ambiguous, and applicable to either Court. In *Impey v. Taylor*, the Court relied on the addition to the Court of the Bench, "at *Westminster*," as peculiarly designating the Court of Common Pleas.

The Court, however, gave judgement for the Plaintiff.

(a) 3 *Maule & Selw.* 166.

Jan. 28.

BENSON v. SCHNEIDER.

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Where a practice prevailed of compressing bales of cotton wool by machinery, to improve their stowage, the furnishing a cargo of cotton wool in uncompressed bales, as they came from the grower, was held not to be a compliance with a contract to load a full and complete cargo.

THIS was an action on a charter party brought for not having put on board the ship *Canada*, from *Charlestown* or *New Orleans*, at the freighter's option, *pursuant to the terms of a charter party entered into between the Plaintiff and the Defendant, "a full and complete cargo, not exceeding what the

Where the freighter had an option to load a whole ship with one species of goods at a higher rate of freight, or a part with goods at a higher rate, and a part with another species of goods at a lower rate, but the latter, if laden at all, required to be first laden on board, the freighter, by beginning to load with the goods at the higher rate, was deemed to elect to furnish an entire cargo of those goods at the higher rate, and he having so elected, but failing to load a complete cargo thereof, Held, that the jury were warranted in giving damages for the entire complement at the higher rate, without regarding the liberty he once had to load goods at a lower rate.

ship

ship could reasonably stow," for which freight was to be paid, if the goods were shipped at *New Orleans*, for cotton in round bales, 3*d.* per lb., and in square bales 2½*d.* per lb., and for rice 8*l.* 8*s.* per ton, which the Defendant was at liberty to put on board, not exceeding 150 tons. Upon the trial of the cause at *Guildhall*, at the sittings after *Michaelmas* term 1816, before *Burrough*, J., it appeared that the vessel not obtaining a cargo at *Charlestown*, was ordered to *New Orleans*. The terms round and square bales were more immediately applicable to the trade at *Charlestown*, where they were so distinguished, the round bales consisting of cotton wool merely packed by hand into bags or trusses, and the square bales being made in a cubical bag, which was inserted into a cubical wooden chest, and the cotton wool was forcibly trodden into it by men; the latter bales were consequently more compact. At *New Orleans*, all the bales were originally, when they came down from the country, square, otherwise called compressed, bales, and were packed in the mode last mentioned; but along the shore were erected steam-engines, by the power of which the compressed bales were strongly recompressed and condensed into a much smaller bulk; and it was the established and uniform practice of that port, to recompress all cottons for exportation, unless the ship which was to take them was unable to get a full cargo, in which case it was deemed unnecessary to incur the expense of this process. If rice were to be put on board, it was necessary that it should be laden before any part of the cotton was laden, being more ponderous. The ship chartered would have contained 170 tons of recompressed cottons above the cargo which was shipped. The Defendant put on board an insufficient cargo of ordinary compressed bales, without putting any rice on board. The jury found a verdict for the value of the freight of the 170 tons of cotton which the vessel would have contained, if she had been wholly laden with recompressed bales.

Lens, Serjt., now moved for a new trial, first, upon the ground that the Defendants were not bound to furnish a cargo of recompressed bales of cotton, but only of cotton packed in the ordinary way in which it is sent to market by the grower; secondly, that too high a rate was assumed for the deficient freight, for that the jury ought to have taken into the account the circumstance that the Defendant was at liberty to put on board an hundred and fifty tons of rice, at the freight of 8*l.* 8*s.* per ton, whereas he was to pay freight for the cotton after the

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the rate of 28*l.* per ton; and it would materially have reduced the Plaintiff's claim, if the Defendant had put on board his allowed quantity of rice, and only the residue of the cargo in cotton. He also offered an affidavit, that the master of the vessel never remonstrated against taking on board the ordinary square bales, until after a great part of the cargo was laden, when he required the residue to be delivered in recompressed bales.

Per Curiam. It cannot be contended that a cargo of compressed bales is a full cargo, and although the freighters might ship a hundred and fifty tons of rice, yet, inasmuch as it was in evidence, that the rice, if loaded at all, must be put in before the putting in of the cotton, they have elected to put in an entire cargo of cotton; and therefore the freight of the complement of the ship's cargo in cotton, and not in rice, must be the measure of damages.

Rule refused.

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Jan. 31.

BYLAND v. KING.

Affidavit that the Defendant is justly indebted in a sum for principal and interest due on a bond made by the Defendant to B., in a greater penal sum, is good, though it do not state the condition of the bond to be for the payment of money.

If the assignee of a bond takes on himself to disaffirm, by his affidavit, a tender in bank notes by his assignor, the Court will not reject his affidavit.

THE Defendant had been arrested upon an affidavit of *J. Naylor*, that the Defendant was justly and truly indebted to *Francis Count Byland*, and *Isabella Countess Byland*, his wife, in the sum of 3000*l.* for principal and interest due on a bond dated 7th *December*, 1810, and made and entered into by the Defendant to the said *Francis Count Byland*, and *Isabella Countess Byland*, his wife, in the penal sum of 6000*l.*, and which bond had been duly assigned to the deponent; and he proceeded to state that no offer had been made to pay in bank notes.

Lens, Serjt., had on a former day obtained a rule *nisi* to discharge the Defendant out of custody upon entering a common appearance, upon two supposed insufficiencies in this affidavit. First, that since it appeared by the affidavit that the bond was given for a penal sum, it ought also to appear, that the condition of the bond was for the payment of money, so that such a debt as was sworn to might arise thereon, otherwise, for aught that appeared, it might be conditioned for performance of covenants, or other matter, on which no debt arose. He cited *Bos-*

sanquet

sanquet v. Fillis (a). He also objected, that the deponent had taken on himself positively to disaffirm a tender of bank notes to the obligees, which he, who was merely the assignee of the bond, could not possibly know; he could only possess information and belief. *Smith v. Tyson* (b).

Best and *Onslow*, Serjts., showed cause. This affidavit pursued a printed precedent (c), in common use. And it sufficiently appeared by the positively swearing to the debt, that the bond must be either single, or conditioned for payment of money, and not for performance of covenants, nor for other unliquidated damages. As to the second point, the deponent undertakes to know the fact; if the affidavit be false, indict him for perjury; if he has sworn to too much, it will not vitiate. The act 43 G. 3. c. 18. s. 2. is, that if there be any part of the affidavit disaffirming a tender of bank notes at all, it is incumbent upon the opposite side to affirm the tender.

Shepherd, Solicitor-General, and *Lens*, Serjt., in support of the rule. It must appear on the affidavit, that the bond is such an instrument on which an actual debt arises, and therefore it ought to appear that the bond was conditioned for payment of money; for to say that he is indebted for principal and interest, may be an inference of law drawn by the deponent from premises which do not warrant it. A common inference will not suffice; for an affidavit that the Defendant is indebted for goods sold and delivered will not suffice, without saying by whom, and to whom, though a very strong inference arises that the goods are sold by the Plaintiff to the Defendant. If this bond were a single bill, then it must appear by the affidavit that it is a single bill; and though in the case of *Bosanquet v. Fillis*, the words for principal and interest do not appear, yet, as that is only the deponent's inference of law, their presence cannot aid him. The second objection, at least, is good.

DALLAS, J. As to the first objection, in the case of *Bosanquet v. Fillis* the material part, that he is indebted for principal and interest, is wanting. How can he be indebted on the bond, for principal and interest, unless the bond be either conditioned for payment of money, or be a single bill? As to the second objection, it is not only in cases where a Plaintiff is residing abroad, that the Courts have permitted the affidavit of the agent in this country to disaffirm a tender to the principal, as in *Andrioni v.*

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(a) 4 *Maule & Selw.* 330.(b) 2 *Bos. and Pull.* 339.(c) *Tidd's Practical Forms*, 2d. edit.

p. 84. s. 42.

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Morgan (a), but in the case of *Knight v. Keyte (b)*, the Court held it enough, though the principal was living in *England*, that the agent should deny the tender in bank notes. But if this were a defect, it is aided by the statute (c) 43 G. 3., which cures all similar cases, except where the disaffirmance of the tender is wholly omitted.

PARK, J. I am glad that the case of *Bosanquet v. Fillis* has been mentioned, because we would not be thought to over-rule so material a case; but there is this very important distinction between that and this, that there it only appeared that the Defendant was indebted on a bond, which, as Lord *Ellenborough* said, may be a bond for performance of covenants, but here it is sworn that the Defendant is indebted for principal and interest. The very case was long since decided in *Loveland v. Basset (d)*, in Mr. *Ford's MSS.*, and that case was stronger, for belief was held sufficient.

BURROUGH, J. We can put but one sense upon the words principal and interest: the bond must be either conditioned for payment of money, or must be a single bill, which latter circumstance it would be unnecessary to state in the affidavit; but unless the bond were the one, or the other, the Defendant could not be indebted thereon for principal and interest.

Rule discharged with costs.

(a) *Ante*, IV. 231.

(b) 1 *East*, 415.

(c) C. 18. s. 2.

(d) Cited in *Van Morsell v. Julian*, 1 *Wils.*

232., referred to *Tidd. Pr.* 5th ed. p. 180. n.

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Jan. 31.

FREE v. HAWKINS.

A Defendant in this court may withdraw his plea, and plead *de novo* on terms, if the Court think it a fit case for such indulgence.

A RULE had been obtained that the Defendant might be at liberty to withdraw his plea, which was a sham plea of a recognizance in this Court, and plead *de novo*, on the terms of pleading issuably, going to trial at the sittings after the term, and giving judgement of the term.

Best, Serjt., opposed this, as an unheard-of application in this Court; when a Defendant puts in his plea, he must abide by it, for better for worse. But

Per Curiam, it is the constant practice to permit Defendants to withdraw their pleas, and plead *de novo* on these terms.

And

And this being a hard case, on a surety, after *Best* had been heard on the facts, they made the

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Rule absolute.

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LUCAS and Others, Assignees of the Effects of DOORMAN, a Bankrupt, v. DORRIEN and Others.

Feb. 3.

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THIS was an action of trover for certain sugar and molasses, and for an indenture of lease. The declaration contained counts, laying the possession in the *bankrupt before his bankruptcy, and in the Plaintiffs, as his assignees, afterwards. The Defendants pleaded the general issue. The cause was tried at the sittings at *Guildhall*, after *Trinity* term, 1816, before *Gibbs*, C. J., when the jury found a verdict for the Plaintiffs, damages 12,000*l.*, subject to a case. On 4th *February*, 1814, the bankrupt applied to the Defendants, who were his bankers, to advance him 10,000*l.* upon his note of hand, and the collateral security of certain sugars, then lying in the warehouses of the *West India* Dock Company, and at other places. The Defendants, being satisfied with the proposed security, agreed to advance the 10,000*l.*, whereupon a note of hand for that sum was drawn, and signed by the bankrupt, and delivered to the Defendants, together with the Dock checks for such sugars, which were all duly indorsed by the Bankrupt, and the Defendants thereupon advanced the 10,000*l.* Of such sugars, part were afterwards sold by mutual consent, and the net proceeds thereof placed to the credit of the bankrupt's banking account with the Defendants, and other parts thereof were, at the bankrupt's request, exchanged for certain quantities of molasses then lying also in the Dock Company's warehouses; and the Dock checks for such molasses were in like manner indorsed by the bankrupt, and delivered to the Defendants. The bankrupt's said note of hand fell due on the 11th *February*, 1815, but it not being convenient to him then to pay it, the Defendants, at his request agreed to continue their said advance for one month longer, upon the bankrupt's renewed note of hand for the like sum, and the collateral security of certain sugars and molasses to be specified on the back of such renewed note. On the 23d *February*, a note of hand of that date, for payment to the Defendants

Whether an indorsement of the delivery checks or warrants of the *West India* Docks will pass the property in the goods therein mentioned?

After a contract for the sale of goods, and a written order on the wharfinger for delivery, communicated to the wharfinger, and assented to by him, though no actual transfer be made in his books, the property passes to the vendee.

A banker has no lien on muniments casually left in his shop after he has refused to advance money on them as a security.

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ants of 10,000*l.* at one month after date, value received, with interest, and expressing that certain sugars and *molasses, as specified on the back, were left as a collateral security, (the numbers, marks of the cask, and other description whereof, were indorsed on the note,) was accordingly drawn and signed by the bankrupt, and delivered to the Defendants, together with the Dock checks for the last-mentioned sugars and molasses, which checks were all duly indorsed by the bankrupt. The only matters in dispute were the hogsheads, casks, and barrels of molasses, referred to in the four dock checks, whereof copies were annexed to the case (a), and also the lease mentioned in the Plaintiff's declaration. On the 2d *March*, 1815, the bankrupt suspended his payments in business, which circumstance was not known to the Defendants until the 4th, when they were informed thereof by the bankrupt's attorney. On 7th *March*, the Defendants applied at No. 3. Dock warehouse, and produced two of the checks so deposited by the bankrupt, one for 51 hogsheads, the other for 19 barrels; which checks, with their indorsements, were examined by the warehouse-keeper, who, after comparing them with the Company's books, said that they were sufficient for the delivery of the molasses. The duties on the 19 barrels of molasses being paid, they were delivered to the Defendants on the 19th of *March*, but the duty on the 51 hogsheads not being paid, they remained in the warehouses. On

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(a) The form of one of these dock checks, for which printed blanks are prepared and kept by the Dock Company, is given below.

This is to certify, that the undermentioned order, for goods deposited in warehouse No. of The *West India* Dock Company, has this day been lodged with me.

No. of Order.	Marks of Lots.	Description of Goods.	Ship.	Master.	By whom granted.	In whose favour.
1192 and 3	M A 4 E 33	52 Casks Molasses.	William	Lintclater. Entd. July, 1813.	T. Kemble & Co. and G. Dorien & Co.	G. Ackland & Co.

Given under my hand this 4th *Feb.* 1814.

West India Dock House,

(Signed)

J. T. Hamilton, Clerk.

N.B. To prevent delay, parties lodging orders for the delivery of goods, at the Dock House, are desired to present at the same time this check filled up, and ready for insertion of the number of the order, and the clerk's signature, which will greatly promote despatch.

7th *March*,

7th *March*, the Defendants' clerk likewise applied at No. 6. warehouse, producing two more of the Dock checks, one for 129 casks, the other for 20 casks of the molasses, which checks were in like manner examined, and compared by the warehouse-keeper, who also said that they were sufficient for the delivery of the molasses, but the duties on the 129 casks and 20 casks not being then paid, the delivery of them was not required, and they remained in the warehouse. On the same day, the Defendants' clerk applied at No. 10. warehouse, producing another of the Dock checks for 52 casks of the molasses, which check being examined and compared by the warehouse-keeper, he answered, that he had no objection to the delivery of the molasses. The duties on 35 casks (part of the 52 casks), were paid on the 9th; and on that day, the 35 casks were delivered to the Defendants. On the 10th *March*, the duties were paid by the Defendants on 80 casks (part of the 129 casks), and on the following morning, 11th *March*, the Defendants sent carts to fetch these away; but the delivery of them was refused, the clerk, who was sent to receive them, being told, that a commission of bankrupt had been issued against *Doorman*, and that no more of the molasses would therefore be delivered without the consent of the assignees. No application was ever made by the Defendants to obtain a rehousing of any of the sugars and molasses, of which the Dock checks were so indorsed, and delivered to them on the 4th *Jan.* and 23d *Feb.*, 1815, nor was any part of such sugar and molasses transferred into the Defendants' name in the books of the *West India Dock Company*, but the whole stood and remained in the name of the bankrupt. Some months previous to the 10th of *March*, 1815, the bankrupt applied to the Defendants with the lease mentioned in the declaration, and requested them to advance him money on the security thereof, which they declined. But the bankrupt left the lease with the Defendants, without making any declaration of the purpose for which the same was so left, and the lease remained in the possession of the Defendants, loose, and uninclosed in any cover, from that time, down to the issuing of the commission, and afterwards. On the 10th *March*, 1815, a commission of bankrupt was duly awarded and issued against *Doorman*, on an act of bankruptcy committed by him on 8th *March*, but of which act of bankruptcy the Defendants had no knowledge, nor had received any information thereof, until after the issuing the commission, and on 10th *March* a provisional assignment was made to *J. Billing*, who on the

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same day gave notice to the *West India Dock Company* of such commission and assignment. On 25th *March*, an assignment was made to the Plaintiffs; on 26th *March*, the bankrupt's said renewed note for 10,000*l.* fell due, and was not paid, nor has the amount thereof been since reduced, save as hereinafter mentioned. In pursuance of a mutual agreement between the parties, the lease has been sold by the Plaintiffs for the net sum of 1218*l.*, and the molasses by the Defendants, for the net sum of 1144*l.* 2*s.* 5*d.*, which sums are to be accounted for by the parties respectively, according as the verdict shall be finally settled in the above cause. At the time of issuing the commission, there appeared upon the face of the bankrupt's banking account with the Defendants, to be a balance 866*l.* 1*s.* in favour of the bankrupt; but in such account was not included the amount of the bankrupt's unpaid note of 10,000*l.* of the 23d *February*, 1815, so received by them as aforesaid. After debiting the banking account with the unpaid note of 10,000*l.*, and with certain payments since made by the Defendants, and after crediting it with monies since received by them in respect of the said collateral securities, there was and is a final balance due to the Defendants from the bankrupt's estate of 3,499*l.* 1*s.* 11*d.*, for which balance, or any part thereof, they held no security whatsoever, nor did they possess any claims in respect thereof, other than their claims upon the net proceeds of the lease, and the dividends which might be payable under the commission in respect of their final balance, or of some part thereof, the net proceeds of the molasses so sold by them under the said agreement being comprehended in the said final balance of 3,499*l.* 1*s.* 11*d.* The molasses and lease in question having been disposed of by mutual consent, prior to the commencement of the action, such disposition thereof was to be considered as equivalent to a demand and refusal. The questions for the opinion of the Court were, whether the Plaintiffs were entitled to recover for the molasses, or any and what part thereof, in this action; and whether they were entitled to recover for the lease. If the Plaintiffs were entitled to retain the verdict, the amount of the damages was to be settled according to the rule which the Court should pronounce. If not, a nonsuit was to be entered.

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Best, Serjt., for the Plaintiffs, stated that in this case the effect of the Dock warrants would be discussed. In the case of *Zwinger v. Samuda* (a) the Defendant had made another person

(a) *Ante*, 257.

his agent, for the purpose of delivering the Dock warrants, therefore, beyond all question, he could not afterwards rescind the act of that agent, and upon that ground it was that the Court had decided. There the rights of a third person intervened. This is a mere pledge of personal property, and it is clear law, that a pledge of personal chattels is void, unless accompanied with actual delivery. Here was no delivery. The notice to the Dock Company, though given before the act of bankruptcy, cannot vary the operation of the transaction. Nothing was done to reduce the property into the Defendants' possession. The case of *Harman v. Anderson* (a), if duly attended to, is favourable to the Plaintiff. Lord *Ellenborough* says, "the goods having been transferred into the name of the purchaser, from that moment the Defendants became trustees for the purchaser, and there was an executed delivery as much as if the goods had been delivered into his own hands;" that was necessary to have been done here, which was done in *Harman v. Anderson*; namely, that before the bankruptcy the Defendants should have gone to the wharfinger, and had the goods registered in their own name. The mere dock warrant cannot, in point of law, pass the property by indorsement. If, however, the case should turn on this point, the Plaintiff prays the case may be made a special verdict. But if this symbolical delivery be any delivery at all, it is yet only symbolical, and the goods were, as to all the world, in the apparent order and disposition of the bankrupt, within the statute 21 *Jac.* 1. c. 19. s. 11. If, after giving over to the Defendants these dock warrants, the bankrupt had offered to sell these goods, if the purchaser had looked into the Dock Company's books, he would have found these goods still entered in the bankrupt's name: and though, by further enquiry, perhaps, he might learn the further facts, yet that entry is enough to give the bankrupt a credit. It is not necessary, according to *Horne v. Baker* (b), that the bankrupt should have the absolute right to sell; it is enough if he has the apparent right; and although in that case the goods were in the bankrupt's own house, and here they are in a common warehouse, yet that makes no solid distinction, for this warehouse is every man's own house, so long as the goods are booked in his name. The case of a bill of lading was decided on the special usage of merchants, found by a jury. In *Gordon v. East India*

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(a) 2 *Camp.* 244.(b) 9 *East*, 215

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Company (a), *Cameron* assigned by deed-poll to *Taylor* his privilege of private trade on board a Company's ship; (a deed-poll is at least as good a conveyance as this warrant:) it was held that no property passed. Lord *Kenyon* says "In this case there were no documents which the party could carry to market for the purpose of making a transfer of these goods." There was less reason for the decision there, than exists in this case, for there *Taylor* was guilty of no laches: he could not get the property transferred into his own name; here the Defendant could have gotten it transferred, but did not. In *Thackthwaite v. Cock* (b) the judgement of *Mansfield*, C. J., is extremely applicable. Here "no one could perceive or know that these goods were not the property of the pawnor." In the case of *Horne v. Baker* (c) inquiry would have disclosed the whole; but it was held not to be sufficient that the fact might possibly be discovered by inquiry.

[286] *Pell*, Serjt., *contra*. As new circumstances and subject matters arise, the Courts will apply to them the principles of the known law. These dock warrants are in the nature of a public instrument. It is not enough to say that persons requiring may see an entry in the dock books: the Dock Company give to the owner an instrument of a higher nature than the entry in their books, and it is by the transfer of that instrument that the property ought to pass. It would impose grievous shackles on the commerce of the country, if persons were forced to examine the Dock Company's books, in order to see whether the goods are warehoused in the vendor's name. No mischief has resulted from the doctrine of *Lickbarrow v. Mason* for 30 years, and the Defendant seeks to put these dock warrants on the same ground as bills of lading. The case of *Spear v. Travers* (d) is decisive. There it is expressly found that the Defendants had paid rent down to the time of the bankruptcy. Here, though it does not appear on the case, the warehouse-rent has been paid by the Defendants. *Gibbs*, C. J., there says, "I think the Defendants had no right to stop these goods: they had been paid for them. I am of opinion that the Plaintiff, to whom the certificate was transferred for a valuable consideration, is entitled to recover." And the gentlemen of the special jury observed, that in practice the indorsed dock warrants and certificates are handed from seller to buyer, as a complete transfer of the goods. It is required by the statute 21 *Jac.* 1. c. 19. that persons becoming

(a) 7 *Term Rep.* 228.

(b) *Ante*, III. 484.

(c) 9 *East*, 215.

(d) 4 *Campb.* 251.

bankrupt

bankrupt should have the property in their possession, order, and disposition: and the Plaintiffs' counsel has cited no case in which goods not being in the actual possession of the bankrupt, he has been deemed to have the order and disposition of them. Here the bankrupt has not the possession: and they are not in his order and disposition, for he could not have the order and disposition, unless he had the dock warrant; and that he had parted with. The case of *Gordon v. East India Company* is not like this: the instrument made use of in that case was of a private nature, this is the case of an instrument, not indeed of a public nature, but *quâ* in the nature of a deed of a public nature. *Thackthwaite v. Cock* is not to the point. Clearly a custom of the hop-merchants could not contravene the statute of 21 *Jac.* 1. Next, as to the lease. The bankrupt left it with the Defendants without any declaration made by him of the purpose for which the lease was left. A banker has a lien for his general balance upon all papers and securities of the customer.

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Best, in reply. The case of *Spear v. Travers* is inapplicable. It was decided on no such ground as is supposed. *Gibbs*, C. J., puts it upon the gross fraud. He says, "I think the Defendants had no right to stop these goods. They had been paid for them. This is an improper attempt on their parts to assist *Meaby*. They have not got possession of the goods in the exercise of any right to stop *in transitu*, but by a falsehood." The decision proceeds upon the ground, that the fraud of the transaction rendered it void. The special jury certainly mentioned the practice. The usage of merchants is undoubtedly part of the law of the land; but these ephemeral practices are not; and the distinction stands upon great authority. For, in *Lickbarrow v. Mason*, as I have heard, the Plaintiff's counsel prayed Lord *Kenyon* to put it to the jury, what was the practice: that learned judge refused, and persisted in putting to them the question what was the usage, and afterwards, addressing himself to the counsel, he said, "Where is your bill of exceptions?" The jury there found the immemorial usage; but here, the jury go not further than the practice, which there the Plaintiff's counsel thought arguable. In the statute of 21 *Jac.* 1. is the expression, "whereof they shall be reputed owners:" an apparent owner and a reputed owner are much alike. If, to common observation, the property appears to be in the ownership of the bankrupt, it suffices to bring it within the statute. The Court will so apply the old law, as to provide for new cases. Since the establishment of these

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these docks, all men are obliged to keep their goods there, but though they are kept there, every bale has an ear-mark: every one who passes by the goods can find to whom they belong, by inspection of the Dock Company's books, without any fee. The Court, therefore, will make no difference between this dock and private warehouses. In this view, all the cases cited for the Plaintiff apply, but particularly that of *Gordon v. The East India Company*. There the goods were in the Company's warehouse: *Taylor* could have no other possession than by giving notice to the *East India Company*, which he might have done: this case is so much the stronger for the Plaintiff. The property is lost to the Defendants by their negligence in omitting to have it transferred into their own name.

DALLAS, J. If I could myself entertain the least degree of doubt, I should wish this case to go to a second argument, but I entertain no doubt on it whatever. The facts are, that the bankrupt applies to the Defendants, who are bankers, to discount for him a note for 10,000*l.* on the security of these sugars, and they receive an assignment of the Dock warrants. The Defendants are unable to pay, and the bankers consent to renew the note for another month: an act of bankruptcy takes place on the 8th of *March*: notice of the transfer was given to the Dock Company on the 7th, the day before the bankruptcy. If, therefore, there was any complete delivery, there was a delivery to the Defendants before the bankruptcy. And there is this further fact: the clerk of the Dock Company, on the dock warrant being exhibited to him, says, "this will suffice." Therefore I must take it, that the Dock Company, through their agent, had notice of the transfer; and though nothing was done in consequence of that notice, yet it falls within the case in *Campb.* where Lord *Ellenborough* held, that he mere giving notice to the wharfin-ger, without any thing done thereon, was effective to complete the transfer of property. It is not necessary in this case to decide, whether an indorsement of the dock warrant will pass the property, and though I should feel no doubt in deciding the general question, yet I hold it more prudent in this case to abstain. This is also distinguishable from every other case, except the case of *Spear v. Travers*, and *Harman v. Anderson*, decided by Lord *Ellenborough* and the Court of *King's Bench*. There are two parts in the last-mentioned case, and though Lord *Ellenborough*, C. J., did say at the trial that the transfer in the books passed the property, yet he afterwards says, "The delivery note

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was sufficient, without any actual transfer being made in their books." *Spear v. Travers* is valuable for two purposes: first, it shows what *Gibbs, C. J.*, held, respecting the operation of these dock warrants; secondly, it shows that a special jury have expressed an opinion upon the subject. The sugars must be deposited with the Dock Company for securing the duties. The warrant itself contains a form of indorsement. What can be stronger to show the intention of the parties, that the property should pass by indorsement, than the form of indorsement put on it in the original making of the instrument? In *Lempriere v. Pasley (a)*, *Ashurst, J.*, lays down, that the assignees must be affected with the same equities as the bankrupt; and as a banker would have a lien against the bankrupt, so has he against the assignees. But it is said, the property itself must be actually delivered, and cannot pass by delivery of the securities. The general rule is this: if the bankrupt indorses the bill of lading of a ship at sea, the property passes. The reason is given in *Lempriere v. Pasley*, viz. that the beneficial interest is in the creditor, though the legal estate is in the bankrupt. How can it be said, that where the property, by its nature, is to pass from hand to hand by the assignment of the document which is the title deed of the property, there it shall not pass by indorsement of these dock warrants. Here too is proved a notice, and actual assent by the clerk of the Dock Company, saying "all was right." The second point is decided by the first. It does not appear to be possible that it can be seriously contended that these goods were in the order or disposition of the bankrupt. The principle of that statute of *Jac. 1.* is, that mere possession of goods is the first proof of property, and the holder gets credit accordingly; and he who trusts a bankrupt with the possession, will abide the event accordingly. But here the bankrupt had neither the actual nor the legal possession. But suppose he had a legal possession, was the property that of which he was the reputed owner? If, after borrowing the first 10,000*l.*, he had gone to another banker, to borrow more, he could not have done it, without indorsing the dock warrant to the lender, and that he had not to produce. I have been several times stopped by a special jury, they being satisfied that the goods pass from hand to hand by indorsement of these instruments. All special juries cry out with one voice, that the practice is,

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that the produce lodged in the docks is transferred by indorsing over the certificates and dock warrants, and therefore there is no reputed owner, *if he does not produce his certificate. The case of the dyer's plant, *Bryson v. Wylie* (a), is not applicable. Nor is that of *Taylor v. The East India Company*. That case is expressly the reverse, for no transfer could be made in the books of the *East India Company*: it was a breach of their regulations for *Cameron* to part with that privilege at all; therefore taking this either on the justice of the case, or on the law of the case, the Plaintiffs are entitled to recover.

PARK, J. Notwithstanding the present state of the Court (b), and the importance of this question, and the quantity of property depending on it, it would be improper for me to entertain a doubt, in a case where there is no ground for doubt at all. It was argued by the counsel for the Plaintiff, that the apparent ownership remained with the bankrupt, but I know not what more the bankrupt could do to divest himself of the possession, than he did. For the bankrupt gives an order to the Dock Company for delivery of the whole, and the Defendants did get possession of two parcels of these goods, which actually were delivered. Therefore the bankrupt had done all that depended on him. I give great weight to the inconvenience which the Defendant's counsel relies on, that it would be dreadful, if a merchant had to go down to the dock ten or twenty times in a day to see to transfers of these goods. No man living would have purchased these goods, unless the dock warrants had been produced: they were the key of this property. All the cases are distinguishable: in every one of them there was a possession, which there is not here. Was there a delivery here? If not,

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(a) 1 Bos. & Pull. 83. n. S. C. Cooke's Bankrupt Laws, 3d edit. 417.

(b) *Gibbs, C.J.*, being disabled, by severe indisposition, from attending the Court during this term.

BURROUGH, J. There is not a question as to the lease. The case states that the bankrupt applied to borrow money on it, which the Defendants declined to lend: a court of equity, therefore, never would have deemed this a security for money. It was left in the Defendant's banking-house by mistake, and the Defendant's possession of it is explained. As to the other part of the case, I have no doubt but that the property is in the Defendants. This instrument is perfectly well known to all traders, and is also known to them that the goods pass by indorsement of it, and there is no reason why they should not: it is a transfer of a mere chattel, and there is no reason why an order for delivery of the goods should not pass the property. I should have thought, independently of the notice to the Dock Company, that the property was transferred by the mere indorsement for a valuable consideration. One circumstance is important, as clothing the party with the actual possession of the goods, that the warehouse-keeper declared the orders sufficient for the delivery of the goods, and delivered a part of them. This is a question between two original parties, and not between an indorsee and another. As to the statute of *James*, the goods must be by the consent and permission of the true owner, in the order and disposition of the bankrupt. It is impossible to believe, that on the 8th, these goods were in the possession of the bankrupt, with the consent and permission of the Defendants. The moment that notice was given to the Dock Company, they were converted into trustees for the Defendants, if it be necessary so to contend; but it is not necessary to go so far, for the statute points to an actual possession. In *Horne v. Baker*, there was the actual possession, and the goods were used in his trade of a distiller. *Bryson v. Wylie (a)*, was decided upon the ground that it was a fraudulent trick. Had the bankrupt here the power of alteration or disposition of these goods? How could he transfer them? No man in the city of *London* would have bought these goods without seeing the dock warrant. It was not, in the nature of things, possible that the bankrupt should sell or dispose of them. In the case of *Gordon v. The East India Company*, no alteration could be made in the books of that company, and *Cameron* was acting in disobedience to their orders, which he was bound to obey: therefore his act was a fraud on the Company, and the case mainly turned upon that circumstance. I know not whether

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(a) *Cooke's Bankrupt Laws*, 3d. edit. 417. 1 *Bos. and Pull.* 83. n.

these

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these instruments were in use at the time when the case of *Gordon v. The East India Company* was decided : but Lord *Kcnyon*, C. J., relies there, on the absence of a document which *Taylor* could have carried to market for the purpose of disposing of that property. Here is that document. What *Mansfield*, C. J., says in *Thackthwaite v. Cock*, is material to the present case (a). He says, "there is not such a clear, distinct, and precise custom proved as would enable others to see that these may not be the hops of the possessor." Here subsists, I will not call it a custom, but so clear an understanding of the trade, that this instrument by indorsement would pass the property, that every one may see that they are no longer the property of the bankrupt, who has ceased to possess this document. The Defendants are therefore entitled to our judgement on this part of the case, though not on the other.

Judgement for the Plaintiff for 1218*l*.

(a) *Ante*, III. 491.

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KING and Others, Assignees of WAINE, a Bankrupt,
 v. BRIDGES.

The Court will not compel the sheriff to try a right between two conflicting parties, but will compel the party suing him, to indemnify him.

A RULE had been obtained by *Best*, Serjt., for staying proceedings in this, which was an action against the sheriff, until the sheriff was indemnified to the satisfaction of the prothonotary. The sheriff having, on 6th *December*, taken the goods of *Maine*, under an execution delivered to him on the fourth at the suit of *Flower*, received from the Plaintiffs a notice of *Maine's* bankruptcy, and that the Defendant must desist; in consequence whereof he applied to *Flower* for an indemnity, if he should persist : *Flower* refusing this, he applied to the Plaintiffs to indemnify him if he would return *nulla bona*, which the Plaintiffs in like manner refused. The Plaintiffs had now brought an action against the sheriff for the value of the goods, which he had in the mean time sold, and the proceeds whereof he offered to pay over to them upon receiving a proper indemnity.

Onslow, Serjt., upon these facts showed cause ; and *Best* supported his rule, which the Court made

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WILSON and Others, Assignees of CLARKE, a Bankrupt, and Another, v. HART.

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THIS was an action brought to recover the price of certain wool alleged to have been sold by *Clarke*, before he became a bankrupt, to the Defendant; and upon the trial of the cause at *Guildhall*, at the sittings after *Trinity* term, 1816, before *Gibbs*, C. J., the facts appeared to be these:— The Defendant, who was a clothier, had had previous dealings with *Reed*, a *Blackwell-Hall* factor, who was indebted to him; and *Reed* had had previous dealings with *Wilkins*, a wool-broker, who had in his hands for sale some wool of *Clarke* and *Gray*, who were partners. *Reed* being pressed for payment of his debt by the Defendant, who wanted wool, told him he thought he could get credit for wool, and, in the absence of the Defendant, informed *Wilkins*, that he was commissioned by the Defendant to purchase wool, for doing which he was to have only a penny per pound commission. The Defendant soon after, and three or four days before the sale, sent to *Wilkins's* warehouse, examined the wools, inquired the price, said it amounted to a very large sum, and asked whether the payment could not be divided, fixed his own time for payment of it, superintended the weighing of a part, directed the wool to be delivered at the *Kennet* wharf, and received it there. *Wilkins* swore he thought he was selling to *Reed* for the Defendant, and did not know that *Reed* was buying for himself in order to sell to the Defendant. A contract-note was sent two days after by *Wilkins* to *Reed*: it was seen by the Defendant, who was at *Reed's* counting-house, and said to *Wilkins* thereon, “You brokers are in a great hurry to send in your contract-notes.” *Reed* paid for the wool by two bills of 500*l.* each, drawn by *Clarke* on *Reed*, and corresponding in amount with the price of the wool. The bought note which *Wilkins* drew up and sent to *Reed* was as follows:—“Mr. *R. Reed*; I have bought of Mr. *G. Clarke*, for your account, thirty bags of *Spanish* wool, viz. twenty bags (stating their marks), at 6*s.* 8*d.* per lb.; ten (stating their marks), at 6*s.* 6*d.* per lb., tare and draft 11 lbs. per cwt., to be paid for by *W. Hart* and Co. bills at two months’ date from six months; twenty-one days allowed to weigh one-half, and thirty-five days allowed to weigh the remainder. July 10, 1813. John Wilkins.” It also contained

The statute of frauds does not exclude parol evidence that a written contract for the sale of goods, purporting to be made between *A.* the seller, and *B.* the buyer, was, on *B.'s* part, made by him only as agent for *C.*

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tained another item of five bags of wool, which the Plaintiffs had sold to *Reed* a few days before, and with which the Defendant was in no respect concerned. The invoice sent in debited *Reed*, and corresponded with this bought note. *Wilkins* stated that he did not charge *Reed* any commission for purchasing these wools, because he understood from him, that he was to receive from the Defendant a commission of only 1*d.* per lb. thereof. He would not have credited *Reed* to such an amount. The bills were said to be bills which *Reed* had accepted for the Plaintiff's accommodation, and that the reason why they tallied in amount with the price of the wool, was, that the Defendant's payment for the wool, which would pass through *Reed's* hands, would precisely meet the exigency of these bills. For the Defendant it was contended, that these goods were sold to *Reed*, and not to the Defendant; and *Reed*, being examined as a witness, stated that he was not a broker, but a merchant, though he on cross-examination admitted, he had sometimes acted as a broker; that he bought these wools on his own account, and was free to sell them to whom he pleased, and that the Defendant was under no contract to purchase them of him; that he had never told *Wilkins* that he was buying them as agent for the Defendant: he had no authority from the Defendant to purchase for his credit, or to give his bills; that he had communicated to *Wilkins* his intention of purchasing these goods of *Clarke* on credit, in order therewith to discharge his debt to the Defendant. *Reed* having stopped payment a short time before the price of the wool became payable, the Plaintiffs then first applied to the Defendant for payment. *Gibbs*, C. J., told the jury, that the question for them was, whether this was, in substance, a sale to the Defendant, or to *Reed*. He thought it was a sale to *Reed*. If they thought this was a fraud between the Defendant and *Reed*, who intended to get these goods for the Defendant, and to enable *Reed* to pay his debt to the Defendant with *Clarke's* wool; and if the Defendant, by his own conduct, gave the seller reason to think *Reed* was buying for him, the Defendant, they might find for the Plaintiff; but he pointed out to the jury, that all the circumstances were known to all parties, when they made the written contract, and therefore the greater credit was to be given to the written documents, which could not deceive. They favoured the Defendant's case: but if the jury thought that the Defendant had all along intermeddled with the sale, and induced the Plaintiffs to think he was going to

to pay them, notwithstanding the sale was, in form, a sale to *Reed*, they might find for the Plaintiffs. The jury found a verdict for the Plaintiffs.

Best, Serjt., in *Michaelmas* Term, moved to set aside this verdict, upon several grounds: first, that the transaction could not be established as a sale to the Defendant, without contravening the statute of frauds, which required, s. 17, a note in writing between the parties; next, that the verdict was contrary to all the evidence; lastly, that *Wilkins's* evidence ought not to have been received, for that it went materially to alter the effect of the written contract, which could not be varied by parol evidence.

The Court granted a rule *nisi*.

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Lens and *Copley*, Serjts., in this term, showed cause. It is no ground of objection to the parol evidence, that there is a bought note between *Clarke* on the one side and *Reed* on the other. The objection goes to this length, that it could not be shown that the party named in the bought note was only an agent, and not the principal. In the late case of *Kemble v. Atkins* (a), this was the whole dispute. It is agreed, that on the written documents the case is favourable to the Defendants; but the question having been left to the jury, whether this were not in substance a dealing with the Defendant, they have in effect found, that it was such. Parol evidence in all similar cases is admissible, not to vary the written contract, but to apply it. Thus, though *A.* has entered into a written contract, parol evidence is admissible to show that he entered into it only as agent. The cases of *Gunnis v. Erhart* (b), and *Powell v. Edmunds* (c), therefore, are wholly inapplicable. *Gunnis v. Erhart* was the case of an auction of land, stated to be free from all incumbrances. Evidence was offered of a parol declaration by the auctioneer, that the premises were subject to a rent of 17*l.* per annum. That affected the terms of the contract, not its application. *Powell v. Edmunds* was the case of a sale of timber, described as growing in a particular close. Evidence was offered for the Defendant, that the auctioneer warranted that it should amount to a particular quantity; the effect of that evidence was to vary the contract, not to show the relation in which the contracting party stood with another. As to the effect of the evidence, *Addison v. Gandassequi* (a), and *Paterson*

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(a) *Ante*, 252.

(b) 1 *H. Bl.* 289.

(c) 12 *East*, 6.

(d) *Ante*, IV, 574.

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v. *Gandassequi* (a), are cases favourable to the Plaintiff. In *Paterson v. Gandassequi*, a new trial was granted because the question had not been put clearly enough to the jury, whether credit had been given to *Larrazabal* to the exclusion of *Gandassequi*, or had been given to *Gandassequi*. Certainly in *Addison v. Gandassequi* the verdict was the other way; but the special circumstances of the case required it, and were so strong, that it was impossible to avoid that conclusion. *Addison* debited *Larrazabal*. That is not so here. *Larrazabal* debited *Gandassequi*. Not so here; for *Reed* did not debit the Defendant. *Larrazabal* applied for the further credit. It was refused, because, the Plaintiff had already credited *Larrazabal* so much. The goods were insured by *Larrazabal* and Co. in their own name, and one of the partners of *Larrazabal* said it was a purchase on their own account. But the Plaintiff calls in aid the principle of that case, as strong for him, that it was a question for the jury. Here *Reed* declares, that he wants goods for the Defendant: he introduces the Defendant to *Wilkins*: the Defendant goes to look at the goods: it does not appear that *Reed* ever did. On the second day after the sale, *Wilkins* brings the contract to *Reed*'s counting-house; the Defendant is there, and observes, "You brokers are in a great hurry to deliver in your contracts." The Defendant goes and superintends the weighing. The Defendant directs the goods to be delivered at the *Kennet* wharf. It was the Defendant who inquired about the terms of payment. These goods were not to go into the account between *Reed* and the Defendant, which then subsisted; why? Because it was a transaction between *Wilkins* and the Defendant, *Reed* acting merely as broker; but if *Reed* was to sell them to the Defendant, they ought to have gone into that account. As to the evidence in favour of the Defendant, the invoice is certainly evidence, as far as it goes. The invoice and bought note are both made out in the name of *Reed*, the broker, as is often the case, though the principal is known. So was it in *Paterson v. Gandassequi*, where the invoice was in *Larrazabal*'s name: and had that circumstance been decisive, the Court of King's Bench would never have sent the cause to another inquiry. *Reed* never interfered at all after the beginning: the Defendant went and inspected and selected the goods to the end, and *Wilkins* was so satisfied that *Reed* was only the Defendant's

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(a) 15 East, 65.

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broker, that he gave him up the brokerage, which he was to have had. The bills given were to be taken up, and the goods paid for another way: the first payment was not made by the bills on the Defendant destined to be given. It is said the Plaintiffs have, by drawing on *Reed*, abandoned their claim on the Defendant; that was only a secondary accommodation; when explained, it leaves the matter as it was before. *Reed* bought the goods, as *Wilkins* says, expressly for the Defendant, and the Defendant communicated his own time of payment. The credit, too, of *Reed's* testimony was much shaken. At first he said he had never been a factor, but was reminded that he had. 2dly, that he had no authority to give the Defendant's bills, when it was written at the bottom of the bought note, "to be paid for in *W. Hart's* bills," which the Defendant must necessarily have seen when the bought note was put into his hands, and would have inquired into it, if he had not approved it. Even if the credit had been given to *Reed*, yet if it was a contrivance of *Reed* and the Defendant to get possession of the goods, that *Reed* might transfer them to the Defendant in discharge of a debt due from *Reed* to the Defendant, it was such a fraud that it could not stand. *Reed* said in his evidence, "I owed the Defendant money: being pressed, I told him, I thought I could get credit for wools." The evidence is all one way. The instruments are consistent. The only repugnance is in *Reed's* evidence, which was inconsistent with the documents. No injustice is done, and the rule ought to be discharged.

Best and *Vaughan*, Serjts., in support of the rule. This is only a bargain between the Plaintiff and *Reed*, not between the Plaintiff and the Defendant. It is not denied that fraud can be proved by parol, to vacate a deed or agreement. Evidence may be admitted to destroy an instrument altogether, but not to take out a material clause and insert another: no evidence was given at the trial, that *Reed* is a broker, nor was he such. A broker is a known legal public officer, governed by statute: he enters into contracts as broker, and it is known that he is such, and those who deal with him are to find out who his principals are: he cannot act as principal without violating his oath. In all sales to a broker, it is always taken for granted, that there is an unknown principal; but here *Reed* contracts as principal, and parol evidence cannot substitute for him another principal; and it is not competent to *Wilkins*, after he has written that he has sold to *Reed*, to say he has sold to the Defendant. The

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mention in the bought note of the Defendant's bills to pay for goods bought on *Reed's* account, makes it clear that *Reed* is the principal, and that the Defendant is to be brought in as a collateral security. If * so, the Defendant cannot be made responsible in this form of action. If this were an action against the Defendants for the price, and they set up the statute of frauds as a defence, would not the invoice of the goods to *Reed* be conclusive that the Defendants were only collateral securities? The cases of *Addison v. Gandassequi* and *Paterson v. Gandassequi* are in point with the Defendant. If *Reed*, whether broker or not, had bought these goods, and the Defendant had not been known in the transaction, and it had afterwards appeared that *Reed* was dealing as agent for the Defendant, then the Defendant would have been chargeable, but the Defendant being known and seen, it must be taken that the goods were sold, not on the credit of the Defendant, who attends, and is seen throughout, but of *Reed*. No answer can be given to the question put by the Court, how came *Reed's* name to be inserted in the bought note? *Reed* knew that he intended to sell to the Defendant, he therefore knew that he should be able to pay with the Defendant's bills, who, he knew, would pay in bills. The statute of frauds requires this contract shall be in writing. If you may substitute another parol contract for it, the effect of the statute is at an end. It is clear that the Plaintiffs had recently sold goods to *Reed*, and therefore it is probable that he sold these also, inasmuch as both are in one invoice made out by *Clarke* to *Reed*. *Wilkins* does not say he sold to the Defendant: he admitted *Reed's* credit was good to a certain extent, but he pretended it was not good to the value of these goods. It was a question for the jury, whether to believe *Reed* or *Wilkins*. *Reed* swears he had no authority from the Defendant to pledge his credit; and if he did it without authority, the Defendant would not be bound. *Reed* did not become embarrassed till the *February* following. The Defendant applies to *Reed* generally, to know if *Reed* can buy any wools, not directing him to any person in particular, but promising that if he can, he the Defendant will give *Reed* 1d. per lb.; and *Wilkins*, who had no sympathy with the Defendant, remits to *Reed* his brokerage, because *Reed's* profit on the goods was so small. There cannot be two principals. There may be a principal and a guarantee. The written documents, according to the opinion of the Chief Justice, here deserve the more credit, because all the facts are known

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known to all the parties. Fraud is, where part of the matter is secret.

DALLAS, J. We are not called on to decide in this case, whether the verdict of the jury be right or wrong, but whether it be so clearly wrong that a new trial ought to be had. The case was left to the jury by my Lord Chief Justice upon a question of fraud, and the jury have, on the whole, drawn a conclusion, that this was a contrivance between the Defendant and *Reed* for the purpose I have mentioned; and this was legitimately a question for the jury. They have believed *Wilkins*, and disbelieved *Reed*, and if I draw the attention of the Court to the evidence of *Reed*; much of it agrees with the evidence of *Wilkins*. *Reed* first goes to *Wilkins* without *Hart*, and the representations he then made, if *Hart* had not appeared, would not have bound *Hart*; but *Hart* himself goes, bargains with *Wilkins* for the goods, sees them weighed, and they are delivered to *Hart*; and therefore this does appear to be a direct contrivance between *Reed* and *Hart*, to get these goods in extinction of *Reed*'s debt to *Hart*. When *Hart* enquires about the weight and quantity, and has the final delivery, can any one doubt that this confirms *Wilkins*'s statement, that *Hart* was the principal, and *Reed* only the agent? In *Kemble v. Atkins*, the struggle was, whether the bought note should prevail, in which was the name of *Kemble*. That case was precisely similar to the present; but I do not put the decision upon that case, or upon any other case; but, on the facts, I think this is a contract made by *Reed*, as agent of *Hart* and Co., and though it is not necessary to decide on that point, I think the verdict was right.

PARK, J. It is the constant course to show by parol evidence, whether a contracting party is agent or principal. This evidence was properly admitted. The next question is, upon the effect of the evidence. The question is, whether the verdict is against the whole evidence in the cause, or against the weight of the evidence in the cause. This is a case in which the very written documents themselves are impeached, on the ground of the transactions between the parties; and therefore the difficulty is not answered by putting them on the side of one witness against another witness. This does appear to be a juggle between the two parties, to defraud the Plaintiffs, and therefore there ought not to be a new trial.

BURROUGH, J. My Lord Chief Justice properly admitted the evidence, and properly left the case to the jury. I can

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find no fault with the verdict of the jury, and the rule ought to be

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Discharged.

Feb. 6.

WHEELWRIGHT v. JUTTING, Bail of FLES.

Bail are not liable on their recognizance for any cause of action which is not stated in the affidavit wherein the Defendant is holden to bail.

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VAUGHAN, Serjt., had on a former day obtained a rule *nisi* to stay proceedings in this cause against the bail; one ground whereof was alleged in the rule to be, that all claims which the Plaintiff had *on the Defendant by reason of the recognizance stated in the declaration, had been satisfied in an action brought by the Plaintiffs in the Court of King's Bench against *E. J. Simmons*, the other bail, with costs, but this ground he afterwards abandoned, the sum paid by *Simmons* not satisfying the extent of the liability of the bail according to the practice of this Court. The Plaintiff had arrested the Defendant, and in his affidavit to hold to bail, he had not stated that the Defendant was indebted to him on any other cause of action than on a bill of exchange. In his declaration he added a count for goods sold and delivered, he obtained judgement by default, and, upon the execution of a writ of inquiry, he recovered for the goods sold, which were, in truth, the consideration of the bill, and he gave no evidence on his count on the bill. And *Vaughan* contended, that the Plaintiff, having failed in the original action to prove that debt, for which alone the bail had become responsible, could not transfer the liability of the bail, to cover another debt, for which they had never engaged themselves, merely by combining other causes of action in the declaration against the principal. He cited *Caswell v. Coare* (a), to show that this Court had recognized the principle.

Best, Serjt., showed cause. He referred to *Dahl v. Johnson* (b). *Caswell v. Coare* is very distinguishable.

Vaughan supported his rule.

DALLAS, J. When we look to what is technical, we find no difference of opinion in the officers, or in the Court: when we look to the books of practice, the text is positive: when we look to the reason of the thing, it is, that if bail are told there is a debt of 167*l.* due on a bill of exchange, they shall not be liable

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(a) *Ante*, II. 107.(b) 1 *Bos. & Pull.* 205.

for goods sold and delivered. The bail ought to know the extent of their responsibility, else it is a fraud on them.

PARK, J. The case of *Dahl v. Johnson* has nothing to do with the question. I may agree to be bail for a friend on a bill of exchange, yet, if he has been extravagant in taking up clothes from a taylor, I may say I choose to have nothing to do with it.

BURROUGH, J. No judge makes an order without having the affidavit before him.

Rule absolute.

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MORRICE v. HURRY and Another.

Feb. 6.

SHEPHERD, Solicitor-General, showed cause against a rule to change the venue from *London* to *Lancashire* (which *Vaughan*, Serjt., had obtained on the usual affidavit that the cause of action arose at *Liverpool*), on the ground that the action was an action of *assumpsit* upon a written instrument, viz. a charter-party, as appeared by the declaration. In *Whitburn v. Staines* (a), in *assumpsit* on an award, not under seal, this was held a sufficient answer to the like motion.

The Court will not change the venue in an action upon any written instrument; the exception not being confined to promissory notes and bills of exchange.

Vaughan, in support of his rule, insisted that the exception was confined to actions on bills of exchange and promissory notes.

But the Court discharged the rule.

(a) 2 Bos. & Pull. 355.

ANONYMOUS.

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Feb. 6.

HULLOCK, Serjt., moved for security for costs from one of several Plaintiffs, who resided in *America*, the others residing here. *Vaughan*, Serjt., *contra*, cited *Mac Connell v. Johnstone* (a).

If one Plaintiff be in this country and liable for costs, though another is resident abroad, the Court will not compel the latter to give security for the costs.

DALLAS, J. When the Defendant has one Plaintiff resident here, who is liable for the costs, it is not necessary to compel security from the non-resident Plaintiff, who, at all events, furnishes an additional resort.

Rule refused.

(a) 1 East, 431.

PARTRIDGE

1817.

Feb. 6.

PARTRIDGE v. FRASER and Another.

The omission to indorse a defeazance on a warrant of attorney is a cause of censure on the attorney who prepares it, but does not avoid the warrant or judgement.

A Plaintiff who, having the joint security of two Defendants, has engaged not to proceed hostilely against the parties, unless he conceives there is danger of their failure, is at liberty, on the increase of his risk by the failure of one, immediately to enforce his judgement against the other.

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COPLEY, Serjt., moved to set aside a judgement, entered up in pursuance of a joint warrant of attorney, defeazanced for payment on 31st *December*, of 740*l.* and interest, but which had been given upon the terms expressed in a letter from the Plaintiff to the Defendants, that the money should be paid by instalments, of which the first had not become payable at the time of the execution, and that the Plaintiff was not to proceed hostilely against the parties, unless he conceived there was danger of their failure; and the plaintiff had stated to the Defendant *Fraser*, that he did not apprehend danger from him, but that he did *from the other Defendant, and therefore he entered up execution against both. He moved upon two grounds, first, that the agreement contained in the letter was the real defeazance, which was neither "written on the same paper or parchment on which the warrant of attorney was written, nor was any "memorandum in writing made on such warrant, containing the substance and effect of such defeazance," pursuant to the rule of this court (*a*). *Morell v. Dubost* and *Sonnerat* (*b*). *Mansfield*, C. J., was there of opinion, that the meaning of the rule was the same as the intent of a part of the annuity act, that it might appear upon what terms the judgement should be entered up, and execution taken out; and that it was a clear and gross irregularity.

But *The Court* said, that they had held in the last term, that the circumstance of a defeazance not being indorsed on a warrant of attorney was a cause of censure on the attorney who prepared it, but constituted no ground of avoiding the warrant of attorney, or the judgement entered thereupon, and refused to grant upon that point even a rule *nisi*. They also referred to *Sharv v. Evans* (*c*), decided in the Court of King's Bench.

Upon looking at which case, *Copley* said, that he abandoned the first point, but he renewed his application, upon the ground that the judgement on the warrant of attorney had been entered up against good faith.

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DALLAS, J. The other Defendant failing, the Plaintiff's security is lessened; and therefore the Plaintiff may proceed against the Defendant who makes this application.

Rule refused.

(a) *Régula generalis*, *Mich. Term*, 43 *Geo.* 3., 3 *Bos. & Pull.* 310.

(b) *Ante*, III. 225.

(c) 14 *East*, 576.

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RITCHIE v. BOWSFIELD.

Feb. 6.

THIS was an action brought against the master of a ship for running down the Plaintiff's vessel. Upon the trial of the cause at *Westminster*, at the sittings after *Michaelmas* term 1816, before *Gibbs*, C. J., it appeared that the damage was done in the *Thames*, at a time when the Defendant's vessel had a pilot on board, as required by the new pilot act (a), and the Plaintiff's had none, and it was doubtful on the evidence in which of the two ships the misconduct was, but no evidence was given of any interference by the Defendant with the pilot's management of his ship. The jury found a verdict for the Plaintiff with considerable damages.

Best, Serjt., in this term moved for a new trial, upon the ground that inasmuch as the Defendant had complied with the requisitions of the act, the verdict in point of law ought to be for the Defendant, for that the only action (if any, seeing that the presumption of misconduct was against the Plaintiff, who had no pilot on board) which could have been maintained in this case, would have been against the pilot. He admitted that he was not aware of the act at the time of the trial, and therefore did not then make the objection, but where the law went to the merits. It was competent now to *raise the objection, as had been done in *Gill v. Dunlop* (b); and this point had succeeded in *Bennet v. Moita* (c). There was a wide difference between applying to the Court on a fact not proved, and founding an application on a consequence of law resulting on a fact proved. The Court granted a rule *nisi*.

Lens and *Hullock*, Serjts., showed cause. This act is quite misconceived when it is applied to the case of one ship running down another. The 30th section is confined to damages that arise to the cargo of the same ship, not to the case of an action brought by the owners of one ship against the owners of another ship. The words "loss or damage" for which the master of a ship is not to be answerable, are, like the loss or damage

Where, upon the facts proved, an inference of law arises on a statute not recollected at the trial, the Court will sometimes grant a new trial, though the point was not taken below.

The pilot act 52 G. 3. c. 39. s. 30. which directs that no master or owner shall be answerable for loss or damage occasioned by misconduct or negligence of any pilot, does not confine the exemption to loss or damage happening to the piloted ship and cargo, but extends to damage done by that ship to others.

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(a) 52 Geo. 3. c. 39. s. 11.

(b) *Ante*, 193. *Gill v. Dunlop*. In that case, upon the first trial, *Lens*, Serjt., was understood by *Gibbs*, C. J., to have referred to the stat. 45 Geo. 3. only, which, without the aid of the statute 42 Geo. 3., would not have legalized a *British* adventure in a *Portuguese* bottom, within the limits of the *South Sea Company*.

(c) *Ante*, 258.

which

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which by the next clause he is not prevented from recovering, "loss or damage upon any contract of insurance or other contract relating to the ship or vessel, or any cargo on board the same." And to put the matter out of all doubt, s. 31. expressly provides, that the act "shall not extend to deprive any persons of any remedy by civil action against pilots or other persons, which they might have had if that act had not been passed." It was clear, that if this act had not passed, the present action would have lain. The preceding sections, 26, 27, 28, and 29, must also be read together, and then it will be plain that the 30th section does not apply to this case.

Best, in support of his rule, was stopped by the Court.

[311] DALLAS, J. The thirtieth section of the statute seems to me emphatically to apply to this case more than to any other; for the steering of the ship is the act of the pilot, and it is in the steerage of the ship, that the other is run down. There is nothing in the objection.

PARK, J. Is not the running down of one ship by another a loss or damage? I can hardly conceive a case, in which the act of the pilot's steering a ship can injure the goods on board the same ship.

The Court upon other grounds indulged the Plaintiffs with a rule absolute for a new trial on payment of costs.

Feb. 7.

SPARKS v. SPINK.

An arrest within the verge of the palace is no ground for discharging the Defendant out of custody.

VAUGHAN, Serjt., had obtained a rule *nisi* to set aside the service of a writ for irregularity, and to discharge the Defendant out of custody, upon the ground that he was arrested within the verge of the palace.

He now attempted to support his rule.

PARK, J. If those who have jurisdiction are injured, it is for them to complain:

BURROUGH, J. It has been decided twenty years ago, upon solemn argument, and in many cases since, that the circumstances afford no ground of discharge.

Rule discharged with costs.

HICKLING

1817.

HICKLING and Another v. HARDEY.

Feb. 7.

THE Plaintiff declared on a bill of exchange, drawn by the Defendant on *Brown* for non-acceptance, and for goods sold and delivered. Upon the trial of the cause at *Guildhall*, at the sittings after *Michaelmas* term, 1816, before *Gibbs*, C. J., the Plaintiff went upon, and proved, his case for goods sold and delivered, which were oranges sent from *St. Michael's* to *London*, but his witness, on cross-examination, admitted that the Defendant had remitted to the Plaintiff from *St. Michael's* a bill drawn on *Brown*, in *London*, for the amount; but that *Brown* had said he would not accept it, because the goods were not packed according to order; but that the Defendant afterwards said, that the goods were properly packed and approved, and if the Plaintiff would again present the bill, *Brown* would accept it. The witness could not prove that the bill had been regularly presented to *Brown* for acceptance, and refused, either on the first occasion, or subsequently, but he produced the bill, from the Plaintiff's custody, unaccepted. For the Defendant it was objected, that before the Plaintiff could recover the price of the goods sold, he must account for the bill (by receiving which the debt had *prima facie* been extinguished) with the same precision as if this were an action on the bill; and *Hebden v. Hartsink* (a) was cited, where Lord *Kenyon*, C. J., held, that if bills are given, they must be presumed to be paid, unless the contrary be shown. *Gibbs*, C. J., recollecting the case of *Bishop v. Rowe* (b), reserved the point, but did not promise a rule *nisi*, and the jury found a verdict for the Plaintiff.

Best, Serjt., had in this term obtained a rule *nisi* to set aside the verdict, and enter a nonsuit, against which

Copley, Serjt., now showed cause.

Best, in support of his rule, urged, that the statute of *Ann* (c) positively enacts, "if any person accepts any bill for, or in satisfaction of any former debt, the same shall be esteemed complete payment of such debt, if the person doth not take his due course to obtain payment thereof." And though this statute applies only to inland bills, yet, as it was passed for the purpose of putting them on the same footing as foreign bills, it is evidence what the law is with relation to foreign bills. In *Stead-*

If a buyer pays for goods by a bill which the drawee refuses to accept, and afterwards desires it may be again presented, and it will be honoured, the holder is not bound again to present it.

Nor to return the bill.

Whether the seller of goods, suing for the price, and producing the Defendant's bill for the price protested for non-acceptance, is bound to prove that it was duly presented for acceptance and refused, *quære*

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(a) 4 *Esp.* 46.(b) 3 *Maule & Selw.* 362.(c) 3 & 4 *Ann*, c. 9. s. 7.

1817. *man v. Gooch (a)*, Lord *Kenyon*, C. J., expressly held, in an action for goods sold and delivered, that it was incumbent on the Plaintiff, who had taken three promissory notes for the amount of his debt, to show that the bills were in default. Even the Defendant's admission that the bill had not been accepted, would not do away the want of protest. If the Plaintiff did not choose to carry the bill a second time for acceptance, and to receive that as payment, he should have returned it.

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DALLAS, J. In *Mussen v. Price (b)*, it was held, that if the Plaintiff take a bill in payment, which turns out to be unavailing, he may immediately recur to, and proceed on his original demand. No case is necessary to prove, that if a bill be exhibited to the person who gave it, and he admits it is not accepted, it is not incumbent on the holder to present it for acceptance again. All the Defendant's argument would have arisen, if the Plaintiff had taken the bill for acceptance the second time; but the Court are unanimous, that the Defendant having the goods, as soon as the drawee refused for a moment to accept, the right of action was well vested. As to the last point, that the Plaintiff ought to have returned the bill, the Defendant never moved on that ground, but there is nothing in it.

Rule discharged.

(a) 1 *Esp.* 4.

(b) 4 *East*, 147.

Feb. 7.

LEVY v. Lord HERBERT.

The Defendant agreed, in consideration of ten sums, of 500*l.* each, to seal, on or before 18th *September*, ten

THE Plaintiff declared on an agreement between the parties, whereby the Defendant, in consideration of the ten several sums of 500*l.* (making together the sum of 5000*l.*) to be paid to him by the Plaintiff in manner thereafter mentioned, agreed

post obit bonds and warrants of attorney to confess judgement, to be in such form, and to contain such clauses, as the Plaintiff's counsel should advise or require; and the Plaintiff agreed that he would, on receiving the bonds and warrants of attorney duly executed, pay the Defendant ten sums of 500*l.* And in case the Plaintiff should not find it convenient on 18th *September* to pay those sums, the bonds and warrants of attorney should, on that day, be delivered by the Defendant to T. W. as escrows to be held until the Plaintiff should pay those sums. In declaring against the Defendant for not executing the bonds on 18th *September*, it was, 1st, held sufficient to allege that the Plaintiff was ready and willing to pay on receiving the bonds, and ready to do all things on his part, without averring an actual offer to pay, or readiness to accept the bonds.

2dly, It was held unnecessary to aver that the Plaintiff's counsel had advised or required a certain bond, and notice to the Defendant.

that

that he, the Defendant, would, on or before the 18th day of *September*, at his own costs make, seal, and duly execute and deliver to the Defendant ten several bonds or obligations in writing, respectively binding himself and his heirs, each in 4000*l.*, conditioned to be void either in the event of the Defendant dying in the life-time of his father the Earl of *Pembroke*, or in the event of the Defendant surviving his father, and paying the Plaintiff within three calendar months after the Earl's decease 2000*l.*, with interest from the time of the Earl's decease, and ten several warrants of attorney, to suffer judgement against the Defendant in actions of debt upon those bonds for the penalties, besides costs, in default of payment of the principal or interest, or any part thereof; the bonds and warrants of attorney to be in such form, and to contain such clauses or agreements, for the purpose of effectuating the intention of that agreement, as the Plaintiff's counsel should advise or require. And the Plaintiff thereby agreed that he would on or before the 18th *September*, on receiving the bonds and warrants of attorney duly executed, pay the Defendant the ten several principal sums of 500*l.* (together 5000*l.*) And it was thereby agreed, that in case the Plaintiff should not, on or before the 18th day of *September* find it convenient to pay the Defendant those ten sums of 500*l.*, then the ten several bonds and warrants of attorney, duly conditioned, signed, and sealed by the Defendant, should on 18th *September* be delivered by the Defendant, at his costs, to *T. Wright*, as escrows, to be by him held and retained as such, until the Plaintiff should pay the Defendant the said ten several sums of 500*l.*, and upon payment of such sums, to be delivered to the Plaintiff for his benefit. Provided that in case either the Defendant, or the Earl of *Pembroke*, should depart this life on or before the 18th *September*, that agreement should be void. And after averring mutual promises for performance, the Plaintiff alleged that the Earl was still living, and that although he, the Plaintiff, was afterwards, on the 18th *September*, ready and willing to pay the Defendant, on receiving the bonds and warrants of attorney in the agreement mentioned, duly executed as therein mentioned, the ten several principal sums of 500*l.* (together 5000*l.*) whereof the Defendant had due notice; and although the Plaintiff had always from the time of making the agreement hitherto been ready and willing to perform, fulfil, and keep all things therein contained on his part, whereof the Defendant had notice, yet the Defendant did not, nor would, although

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though requested, at his costs make, seal, and duly execute, and deliver to the Plaintiff either before or on 18th *September*, or at any time since, the ten several bonds or obligations, or the ten warrants of attorney in the agreement mentioned, but refused so to do, contrary to the agreement, and the Defendant's promise; and afterwards, on 5th *October*, discharged the Plaintiff from any further performance of the agreement, or any thing therein contained on his part, and to be performed and fulfilled, contrary to the effect of the agreement, and of the Defendant's promise. The Plaintiff in his second count stated the agreement in the same terms as in the first count, and averred mutual promises between the Plaintiff and Defendant; and that the Earl of *Pembroke* was still living; and that although he, the Plaintiff, did not pay the Defendant these ten several sums of 500*l.* on or before 18th *September*, and although the Defendant was afterwards, on 18th *September*, requested by the Plaintiff so to do, yet the Defendant did not at his own costs or otherwise, on 18th *September*, nor at any time since, deliver the ten several bonds and ten warrants of attorney so respectively duly conditioned, and signed, and sealed by the Defendant, to *T. Wright*, to be retained by him as escrows, for the purpose in the agreement mentioned, but omitted so to do, although the Plaintiff was afterwards, on 2d *October*, ready and willing to pay to the Defendant the ten several sums of 500*l.* (together 5000*l.*), whereof the Defendant had notice, contrary to the effect of the agreement, whereby the Plaintiff had not only lost the benefit of the bonds and warrants of attorney, but had also been necessarily put to great expenses in and about the preparing himself to the due performance of the agreement on his part, and in and about the endeavouring to complete the same with the Defendant. The Plaintiff averred in his third count, that a contract had been entered into between the Defendant and the Plaintiff for the purchase by the Plaintiff at and for the price or sum of 5000*l.*, of divers, to wit, ten several post-obit bonds, and ten several warrants of attorney, conditioned for the payment collectively of 20,000*l.* within three calendar months after the decease of the Earl of *Pembroke*, with interest from the time of the Earl's death, and to be void in case the Earl should survive the Defendant; and that by the contract it was (amongst other things) agreed, that the Defendant should at his own costs make, seal, and duly execute and deliver to the Plaintiff such bonds and warrants of attorney, and thereupon afterwards, on

2d *October*

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2d October, in consideration of the premises, and that he the Plaintiff, at the Defendant's request, would procure the bonds and warrants of attorney to be prepared, and made ready for execution, the Defendant undertook to pay the Plaintiff as much money as the costs of preparing and making such bonds and warrants of attorney should amount to, whenever after the same should be prepared, and he the Defendant should be thereunto requested. And he averred that he, confiding in that promise, afterwards procured the said bonds and warrants of attorney to be prepared and made ready for execution, and that the costs of so making and preparing the same amounted to a large sum, whereof the Defendant had notice and was requested by the Plaintiff to pay, but refused. The Defendant demurred, and the Plaintiff joined in demurrer.

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Blosset, Serjt., for the demurrer, argued that the nature of the contract was such, that the Defendant was to receive the money before he executed the securities, and therefore the first count was bad, because the Plaintiff did not show that he was ready, and offered to pay the money, and to accept the Defendant's securities, which in *Morton v. Lamb* (a) was held necessary. In *Rawson v. Johnson* (b), on the precedent of which all the succeeding cases had been decided, the Plaintiff averred not only a readiness to receive the malt, and pay for it, but an actual tender to accept the malt. Feeling, however, that the inclination of the Court was strongly adverse to him on this point, he abandoned it; but urged, that the declaration was defective, because it did not show that the Plaintiff's counsel had advised or required a bond in any particular form: the Defendant was not bound to execute any bond or warrant of attorney, but such as the Plaintiff's counsel advised and required. They were to furnish the Defendant with the form which they required. In 1 *Ro. Ab. Condition*, there are many authorities to this effect. If I am bound to enfeoff such man as the obligee shall name, he is bound to name the feoffee.

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Best, Serjt., who was to have argued in support of the declaration, was relieved by the Court.

DALLAS, J., In *Wilks v. Atkinson* (c), *Gibbs*, C. J., held it too clear to bear a question, that an averment that the Plaintiff was ready and willing to accept and pay for the oil, without averring an offer, was good; and that no evidence, either of an offer or readiness was necessary. This is a contract of a most

(a) 7 *Term Rep.* 125.(b) 1 *East*, 203.(c) 1 *Marsh*, 412.

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immoral tendency, and we *should be very glad to help the Defendant against it if we could : but we cannot. The Defendant had better withdraw his demurrer, and try what damages a jury will give.

BURROUGH, J. As to the last point, the meaning of the condition is, that if the Defendant were to present such bonds as the Plaintiff's counsel disapproved, the Defendant must alter them, but the Plaintiff was not bound to consult any counsel. This is a most immoral contract.

Feb. 8.

BROWN v. MILNER and Another.

In an action for seaman's wages, it is not a part of the proof incumbent on the Plaintiff, to show that his ship earned freight.

If the Defendant would disaffirm the Plaintiff's right to wages, he must prove that the ship earned no freight.

THIS was an action of *indebitatus assumpsit* "for wages and reward due and payable from the Defendants, as owners of a certain ship, to the Plaintiff, as master thereof, on their retainer, for a long time before then elapsed." The Defendants pleaded the general issue and the statute of limitations. The cause was tried at a sittings at *Guildhall*, in this term, when it was proved that the Defendants were owners of the ship *William and Mary*, wherein the Plaintiff, in 1800, went as master, on a voyage to *Russia*, where he was detained under an embargo for six months; and a reasonable sum for his wages was ten guineas *per* month. It was proved that the *William and Mary* had since been seen in *England*, but it did not appear when she returned, nor how she was loaded. No distinct evidence was given, that the Plaintiff came home in her as master, nor that any freight on that voyage was earned or received. The Plaintiff proved, that one of the owners had, in 1815; acknowledged the receipt of a letter from the Plaintiff stating that 62*l.* 6*s.* was due to him for five months and 28 days' service, at 10 guineas *per* month, and had answered, that what was the Plaintiff's due would be paid. The same owner, in a second letter, professed ignorance of the business, and referred the Plaintiff to her solicitor, adding that "as the other parties were not willing to pay, she could not think of doing it herself." *Hullock*, Serjt., for the Defendant, objected, that there was no evidence of any freight being earned; but the learned Judge who tried the cause thought that there was evidence to

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go to the jury, and directed them that they must form their opinion upon these letters, in which the Plaintiff noticed that 62*l.* 6*s.* wages was due to him, and the Defendant did not, in her answer, deny the fact, or the service, nor rest her exemption on the circumstance that no freight had been earned. In the case of *Beale v. Thompson* (a), which was a similar action for wages during the ship's detention, the point did not arise, for it appears by the report, that the ship, which went out in ballast, made freight on her homeward voyage. The learned Judge refused to reserve the point, the action being for so small a demand, and the jury found a verdict for the Plaintiff.

Hullock, Serjt., had obtained a rule *nisi* to set aside the verdict, and have a new trial, against which

Best, Serjt., showed cause. He insisted that there was sufficient evidence to go to a jury, that freight had been earned; further, that this was a novel attempt to fix the Plaintiff in an action for seaman's wages, with the *onus* of proof that the ship had earned freight: the practice had been, that the burthen lay on the Defendant, to disaffirm the earning of freight.

Hullock, in support of his rule, urged, that it was a clear point in the law, that to establish a claim to wages, the Plaintiff must either show a title under a specific contract, or prove that freight had been earned. As to the latter point, the letters were no evidence that freight had been earned: they proved only that the Defendant promised, that if the Plaintiff proved a just demand upon her, it should be paid. There never was yet in *Westminster Hall* an action tried for seaman's wages, in which the Plaintiff succeeded without proving that freight was earned and received; that fact appears upon every special case and special verdict, and there was an instance (b) where the special case went down again to a jury, to have that fact found and inserted. It cannot be necessary for a Defendant to disaffirm that which is an essential part of the Plaintiff's title. It cannot be presumed, that the ship returned with a cargo: in fact, many of the ships detained in *Russia* by the embargo in question, did return in ballast. There was no evidence in the cause that the Plaintiff did return in this ship, and unless he fulfilled his whole contract, he was not entitled to recover. In the special verdict in *Beale v. Thompson* (c) these facts are stated: it is expressly found that the seaman did his duty, and

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(a) 4 *East*, 546.(b) *Pratt v. Cuff*, cit. in *Thompson v. Rowcroft*, 4 *East*, 43.(c) 3 *Bos. & Pull.* 405.

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that the ship earned freight; no evidence of either of those facts is to be found here. Lord *Alvanley* and *Heath*, J., both lay stress on the circumstance that the ship came to her port of delivery, and earned her freight; and in the Court of King's Bench, in error, Lord *Ellenborough*, C. J., says (a), The right of the mariner to wages, depends first upon the earning of freight by his owner in that voyage for which he was hired; and his lordship dwells much on the freight; and then says the only remaining question necessary to be decided, in order to perfect his claim to have his wages paid out of that fund, is, has his service under his articles been duly performed by him? That case shows that there must be evidence that freight was earned on the specific voyage. Nevertheless, in that declaration, as in this, there was no averment that freight was earned. This is *indebitatus assumpsit* for wages, to establish that claim by proof, the Plaintiff must show those facts which establish his title to wages. It is a complex proposition, that the Defendant is indebted; it comprehends the fact of the creation of the fund, whence the wages are to come. So, in an action for work and labour, the Plaintiff must show all those things whence the claim for payment may be established. The question whether freight be earned or not, would not depend on the balance of accounts after the voyage; the loss incurred by the voyage of many of those ships which were detained by that *Russian* embargo exceeded the whole value of the ship, though they earned full freight; yet they were held liable to pay the master's and mariner's wages. The judgement of *Lawrence*, J., in the case of *Pratt v. Cuff* cited in *Thompson v. Rowcroft* (b) is strongly favourable to the Defendant. That was an action for a captain's wages. A special case reserved, stated that the ship, after being released from detention by the *Dutch*, procured and brought to *London* a cargo of butter; it would be thought, that this circumstance, being found, furnished an irresistible presumption that freight had been earned; but, upon the suggestion of *Lawrence*, J., the case was sent down again to have that fact inserted. *Hullock* urged, that he had so little conceived that there was any evidence here from which the jury were to infer that freight had been earned, that he did not address the jury on the presumption, as he otherwise would have done, but merely made the objection in point of law.

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(a) *Beale v. Thompson*, 4 *East*, 502.(b) 4 *East*, 43.

DALLAS, J. Since the declaration in similar actions does not aver the earning of freight, it is a strong indication that it is not necessary for the Plaintiff to prove it; for a Plaintiff is entitled to recover upon proof of the facts stated in a sufficient declaration. In the declaration in *Bcale v. Thompson*, there is no averment of the sort; none of the cases cited appear to me at all to touch this case.

PARK, J. We all think there was evidence to go to the jury, but we grant a new trial, upon the terms that the Defendants shall not deny the ownership of the vessel, nor set up the statute of limitations, and we do it on the ground that the Defendants' counsel did not address the jury.

BURROUGH, J. The only question is, whether the proof of freight being earned is part of the Plaintiff's, or the Defendants', case. *Assumpsit* would not lie for wages, without a special averment that freight had been earned, if the doctrine contended for were correct. For, if the law was imperative on the Plaintiff to make this the ground and foundation of his claim, it would be necessary for him to aver it as a condition precedent. And it is a fact of such a nature, that a mariner cannot easily get access to the knowledge or the proof of it, whereas it all lies within the knowledge of the owner, and it therefore is more reasonable that the proof should rest with him.

The Court pronounced that the rule should be made absolute upon the terms above mentioned, the costs abiding the event; [324]

But, on this day, the Court said, that on consulting Lord *Ellenborough*, and the other judges of the Court of King's Bench, they were all clearly of opinion: that proof of the non-payment of freight was part of the Defendants' case, and that proof of the payment of it was not a part of the Plaintiff's case. They therefore thought the rule had better be

Discharged.

REID v. CORNFOT.
Same v. ELLIS.

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THE Plaintiff had commenced two actions, one against the drawer, another against the acceptor, of a bill of exchange

It is not necessary for persons justifying bail by affidavit

in several actions about the same time, to specify in either affidavit the relative order in which they are sworn, and that among their debts they include their liability as bail in the other actions.

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for 250*l*. The same persons became bail for both the Defendants, and they justified by affidavit; in the affidavit made in each action, they swore they were worth 500*l*., after payment of all their just debts. *Blosset*, Serjt., objected to their justification, upon the ground that the sum was insufficient, the double of the aggregate amount of the sums sworn to in the two actions, being 1000*l*., and his client conceived that both the affidavits spoke simultaneously, and referred to one and the same sum of 500*l*. only, and to one and the same amount of the debts of the bail. He cited *Field v. Wainwright* (a), where the same persons becoming bail in four actions, the Court required them in each of the actions to swear to the possession of property to the amount of double the aggregate of the sums sworn to in the four actions, that is, eight times the single debt.

Vaughan, Serjt., who had moved that the bail might justify, answered first, that the objection came too late, for that it ought to have been made at the time of swearing the affidavit. Secondly, that two affidavits cannot be made simultaneously, but must necessarily be sworn successively; and that each affidavit speaks of the property that the bail possessed, and of the debts and engagements that they were liable to, at the moment when they swore that affidavit. The objection supposed, either that the affidavits were untrue, of which there was no evidence, or that it was legally or physically impossible that a person who at any time swore he was worth 500*l*. should possess 500*l*. more, of which he made no mention. But bail, in their justification, were not required to swear that the sum named was the utmost extent of their property, and that they had no more, but only to swear to their possession of such a sum as would satisfy the exigency of the occasion; nor was it required that they should specify the amount of their own debts and incumbrances. If these principles were attended to, the whole matter became clear, and the affidavits were sufficient. When the bail swore the affidavit in the first action, there was no reason why they might not, as they swore, be each worth 500*l*., after payment of all their just debts; and if so, that affidavit was sufficient in the first action. When they swore the second affidavit, their debts would certainly be 500*l*. greater than they were a short time before, because they had increased them by the amount of their liability for 500*l*. in the first

(a) 3 Bos. & Pull. 39.

action ; it was nevertheless not legally * or physically impossible, nor wholly incredible, that they might still have 500*l.* left, over and above what would suffice to discharge their debts so augmented. The Plaintiff therefore had all that he was entitled to, for the bail thus swore to a separate and distinct unincumbered fund of 500*l.* to satisfy their liability in each action, exclusive of the like fund of 500*l.* sworn to in respect of the other action. It was impossible that in *Field v. Wainwright*, the Court could have understood the nature of the application.

BURROUGH, J. If a man justifies bail by affidavit, on two successive days, in two several actions, it never was yet seen that the latter affidavit particularized his liability on the former action, more than any other of the debts of the bail. This affidavit is in the usual form.

The Court allowed the justification.

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AUSTEN v. HOWARD (a).

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THE Plaintiff declared in debt on bond made by the Defendant to the Plaintiff, sheriff of *Surry*, in 500*l.*, which, on oyer, purported to be entered into by *C. Bromley*, the Defendant *Howard*, and *H. Brown*, to *H. E. Austen*, the Plaintiff, sheriff of *Surrey*, and for payment, it was expressed that they bound themselves, and every of them by himself, for the whole, and the heirs, executors, and administrators of them and every of them, sealed with their seals. The condition, upon oyer, was, that if *C. Bromley* should appear at the next county court, and prosecute his action with effect against *W. Stanton*, for taking and unjustly detaining his goods and chattels, therein enumerated, and should also make return thereof, if return thereof should be adjudged, and also should effectually save and keep harmless and indemnified the Plaintiff, his deputies, bailiffs, and ministers, and every of them, for, touching, and concerning the replevying and delivery of the said goods ; and also of, from, and against all actions, suits, damages, losses,

Seem that if a sheriff take a replevin-bond with one surety, and after judgement in replevin for a return, the return fail to be made, whereon party distraining recovers in an action against the sheriff for taking insufficient pledges, the sheriff cannot recover against the single surety more than a moiety of the sum composed of the rent which the party distraining establishes in the replevin-

suit to be due, and the costs of that replevin-suit.

Whether a bond taken by the sheriff upon making replevin, but not in all points conformable to the directions of the statute 11 G. 3. c. 19., be assignable, *quære*.

(a) See *Austen v. Howard*, ante, VII. 28.

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costs, and charges, that might arise or happen to him, them, or any of them, in consequence or by means thereof, then that obligation to be void. The Defendant pleaded, that *W. Stanton* had distrained the goods therein mentioned, for rent alleged to be due from *S. C. Bromley* to *Stanton*, and the Plaintiff, being sheriff, on complaint by *Bromley*, caused deliverance to be made to *Bromley* of the goods so distrained, and on that occasion *Bromley*, and the Defendant as his surety in that behalf, made and executed the said bond, but that the bond was executed by the Defendant, and *Bromley* only, and not by *H. Brown* therein mentioned, or by any other person. To this plea there was a demurrer, and joinder; and judgement, after argument, was given for the Plaintiff, and the Plaintiff, pursuant to the statute, assigned the following breaches. That the plaint in the condition mentioned, afterwards was duly removed at the instance of *Stanton* from the sheriff's court into this court, by writ of *recordari facias loquelam*, and that in *Michaelmas* term, 52 G. 3. it was adjudged, that *Bromley* should take nothing by his plaint, and that *Stanton* should go thereof without day, and have restitution of the corn, goods, and chattels. That *Stanton* sued out of this court his writ *pro retorno habendo*, upon which the sheriff returned an eloignment by *Bromley*, of which premises *Bromley* had notice, and was requested by the Plaintiff to make a return of the corn, &c., according to the condition of the bond: but that *Bromley* did not make a return thereof; that, in consequence, *Stanton*, in *Michaelmas* term, 53 G. 3., impleaded the Plaintiff in this court in a plea of trespass on the case, and in *Hilary* term, in the same year, *Stanton*, by judgement, recovered against the Plaintiff 405*l.* 11*s.* for his damages and costs, by reason of which premises, and in order to prevent himself from being taken in execution for those damages, the Plaintiff was not only forced to pay, and afterwards did pay *Stanton* 405*l.* 11*s.*, but divers other sums of money, to wit, 200*l.* about his defence, and by reason of the several last-mentioned premises, the Plaintiff had been and was damnified to the amount of 1000*l.* The Plaintiff further suggested, that *Bromley* did not, although requested, make return of the corn, &c., but therein made default, by reason whereof the Plaintiff had been obliged to pay *Stanton* 500*l.*; and also to expend other 200*l.*, and was thereby damnified to that amount. He sdly suggested, that the said

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plaint was duly removed at the instance of *Stanton* into this court

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court by writ of *recordari facias loquelam*, and that in *Michaelmas* term, 52 G. 3., it was adjudged that *Stanton* should have restitution of the said corn, &c. That on 17th *June*, in 52 G. 3., *Stanton* sued out a writ *pro retorno habendo*, and the then sheriff returned an eloignment by *Bromley*, of which premises *Bromley* had notice, and was requested by the Plaintiff to make a return of the corn, &c., according to the condition, but that *Bromley* did not make a return of the corn, by reason whereof the Plaintiff afterwards was obliged to pay to *Stanton* 600*l.*, and also incurred 500*l.* costs. This case was tried before *Gibbs*, C. J., at the sittings after *Michaelmas* term, 1816, and the jury assessed the Plaintiff's damages at 439*l.* 1*s.* 11*d.*, subject to the opinion of the Court upon a case, which, in substance, was, that *Bromley*, being tenant to the bailiffs and freemen of *Kingston*, of certain lands, in respect of which 21*l.* 10*s.* rent was in arrear, they, by *Stanton*, their bailiff, distrained the growing crops upon the lands, whereupon *Bromley* levied his plaint upon the Plaintiff, then being sheriff of *Surrey*, who took from him and the Defendant this bond for 500*l.*, being double the value of the goods distrained. The suit in the sheriff's court was removed into this court by a writ of *recordari facias loquelam*, and judgement was given in that suit against *Bromley*, and that the corn, &c. (of which the growing crops consisted) should be returned to *Stanton*, who thereupon sued out a writ *pro retorno habendo*, to which the then sheriff returned, that the goods had been eloigned by *Bromley*; that the latter was called upon to return the same, but refused. *Stanton* then brought his action in the Common Pleas against the present Plaintiff, and in his declaration therein, stated that he had, as bailiff of the bailiffs and freemen of the town of *Kingston-upon-Thames*, distrained in certain closes the growing crops for 110*l.* 5*s.*, and in certain other closes for 101*l.* 5*s.*, due from *Bromley* to the said bailiffs and freemen, for rent of certain closes, which *Bromley* then held of the said bailiffs and freemen, by demise thereof theretofore to him by them made, rendering rent for the same: and according to law detained the said growing crops until the Plaintiff, then being sheriff, upon the complaint of *Bromley*, under colour of his office of sheriff, caused the corn, &c. to be replevied and delivered to *Bromley*, who at the next county court held at *G.* before *J. C.*, &c. then suitors of the said Court, levied his plaint against the then Plaintiff for the taking, &c. his goods, which plaint afterwards by the King's writ to the late

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late sheriff was reorded in this court, by the then Defendant *Austen*, then being sheriff, who returned on that writ the record of the plaint, to wit that at the County court holden, &c., *Bromley* had complained of the then Plaintiff *Stanton*, of a plea of taking and unjustly detaining the said goods, and had found pledges, as well for prosecuting, as for returning them, if return thereof should be adjudged by law, to wit, the Defendant *Howard* and *H. Brown*, as by the writ and return appeared. And thereupon *Bromley* afterwards, in *Michaelmas* term 51 G. 3., in this Court, impleaded the then Plaintiff *Stanton* in the said plea, for that he in certain closes took and unjustly detained the corn, &c. of *Bromley*. And thereupon the then Plaintiff *Stanton*, as bailiff of the bailiffs and freemen of *Kingston* made conusance upon the holding by *Bromley* of the closes in which, &c., for one year and three quarters, as tenant thereof to the said bailiffs and freemen, by virtue of two several demises thereof to him, under 63*l.* rent, and 58*l.* rent, payable quarterly, for 110*l.* 5*s.* and 101*l.* 10*s.* rent then due from *Bromley* to the said bailiffs and freemen. And that afterwards, in *Michaelmas* term 52 G. 3., it was considered by this Court that *Bromley* should take nothing by his writ, &c. and that the said then Plaintiff *Stanton* should go thereof, &c., and have a return of the corn, &c., and thereupon the then Plaintiff *Stanton* freely there in Court remitted to *Bromley* the damages, &c. and it was further considered that the then Plaintiff *Stanton* should recover against *Bromley* 72*l.* 15*s.* for his costs of increase, as by the record appeared, and thereupon the then Plaintiff *Stanton* afterwards sued out of this Court a writ *pro retorno habendo*, to which the then sheriff returned an eloignment by *Bromley*; that the then Defendant *Austen*, being such late sheriff, not regarding the statute, nor the duty of his office, and devising and fraudulently intending to deceive and defraud the then Plaintiff *Stanton*, and to deprive him of his distress and all benefit thereof, did not at or before the replevying and the making deliverance of the said corn, &c. so distrained to *Bromley*, take in the name of *Austen* the then sheriff from *Bromley* and two responsible persons as sureties, a bond in double the value of the corn so distrained, such value being ascertained by the oath of one or more witness or witnesses, not interested in the same corn, &c., or the distress, and conditioned for the prosecuting of the suit in replevin with effect, and without delay, and for duly returning the corn, &c., so distrained, in case a return should be
 awarded,

awarded, which he ought to have done according to the statute, but, on the contrary, wholly neglected so to do; and the then Plaintiff *Stanton* averred that the corn, &c. had not been returned to him according to the effect of that writ, nor to the said bailiffs and freemen; nor had the rents, for which the distress was so made, been paid; nor had the judgement been satisfied; nor had *Bromley* the Defendant, *Howard*, *H. Brown*, or the then Defendant *Austen*, or any other person whosoever, answered for, or paid to the then Plaintiff *Stanton*, as bailiff, or to the said bailiffs and freemen, the value of the corn, &c. so distrained, by reason of which premises the then Plaintiff *Stanton* was wholly deprived of the corn, &c., and of the whole benefit of the distress and judgement. A second count was the same as the first, except that the breach of duty imputed to the sheriff was, that he did not, before and at the time of replevying and delivering of the goods to *Bromley*, take from him pledges sufficient as well for the corn, &c. being returned, if a return thereof should be adjudged by law, as for the prosecuting of his plaint, which he, as such late sheriff, ought to have done according to the statute, and that the Defendant *Howard*, and *H. Brown* above mentioned to have been returned by *Bromley* as pledges, were not sufficient or responsible persons to answer for the return of the goods, nor the value thereof. The damage alleged to result from this breach of duty in the sheriff, was the same as in the first count. The third count was like the others, except in the charge of the breach of duty; the then Plaintiff *Stanton* therein alleged, that the sheriff did not take from *Bromley*, and two responsible persons, as sureties, a bond for double the value of the goods distrained, conditioned for prosecuting the replevin suit with effect, and for returning the goods in case a return were adjudged; and the damage resulting from this breach of duty was the same as in the two first counts. Issue was joined, and the cause was tried before *Mansfield*, C. J., when the jury found a verdict for the Plaintiff, for 284*l.* 10*s.* damages, and the Plaintiff *Stanton* further recovered 12*l.* 1*s.* costs; and the sum of 405*l.* 11*s.*, being the amount of those several sums, was in fact paid by the present Plaintiff to *Stanton*. The several sums of 110*l.* 5*s.* 0*d.*, and 101*l.* 10*s.* 0*d.*, for which the distress was originally made, and the sum of 72*l.* 15*s.* 0*d.*, amount to 284*l.* 10*s.* 0*d.*, the sum for which the jury gave their verdict. The present Plaintiff, in defending that action, was put to the further expense of 23*l.* 10*s.* 0*d.*, which sum, together with

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with the 405*l.* 11*s.* 0*d.*, made the sum of 439*l.* 1*s.* 11*d.*, the sum which the Plaintiff in the present action sought to recover; the Defendant contended, that inasmuch as the sheriff became liable for these several sums in consequence of his own breach of duty, he had no claim against the present Defendant. The Plaintiff, on the other hand, contended, that though the action was in form against the sheriff, for a breach of his duty, yet that *Stanton* was damnified only by the goods not being returned, pursuant to the condition of the bond. The question for the opinion of the Court was, first, whether the Plaintiff was entitled to recover any thing more than nominal damages; and secondly, if so, whether he could recover the whole 439*l.* 1*s.* 11*d.*, or what part thereof.

Lens, Serjt., for the Plaintiff, contended, that although the sheriff had in fact failed in his duty, by taking only one surety instead of two (*a*), yet, that if the return had been made, no damage would have been thereby occasioned to the landlord, and the sheriff's failure in duty would have been *injuria absque damno*. It was the Defendant's omission to make return, therefore, which occasioned all the ill consequences to the sheriff, and he was entitled to recover the whole 439*l.* 1*s.* 11*d.*; but if not, yet at all events he was entitled to recover the 284*l.* 10*s.* 0*d.*; for to that extent *Stanton* recovered in the replevin suit, for rent and costs, and if the sheriff had most strictly observed his duty, and taken a bond with two sureties, yet the bond being several as well as joint, the present Defendant would, without a doubt, have been liable to that extent to the landlord upon an assignment of his bond; and although he might have had contribution from *Brown* afterwards, that does not diminish his present liability. The Court have decided that the bond is valid as between the Defendant and the sheriff, although by the omission to take two sureties, the Defendant has no one to whom he may resort for contribution: and the sheriff is entitled to recover against the one surety, just so much as the party distraining could, in his action against the sheriff for taking insufficient pledges, recover by reason of his having lost his return. The one surety who executes the bond, is as much a party to the laches, as the other: he ought to have refused to execute, till the other came to execute with him.

Best, Serjt., *contra*. It is admitted to the Defendant, that

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(a) See *ante*, VII. 28.

the 12*l.* costs of the action for taking insufficient pledges, and the 23*l.* extra costs of the sheriff's defence, are not to be recovered. As to the 284*l.* 10*s.*, the statute 11 *G. 2. c. 19.* has directed the sheriff what he was to do; and it was the sheriff's bounden duty, not to deliver the goods distrained, till the bond was executed by two sureties, and he cannot recover against the Defendant for a loss occasioned by his own irregularity. It must now be admitted, that by not delivering the bond as an escrow until the other surety should execute, the Defendant is bound by that as his bond; but it is great injustice that the sheriff should, after his misconduct, recover against the Defendant 284*l.* 10*s.*, when, if the sheriff had done his duty, the Defendant could have recovered a moiety of that sum by way of contribution. Therefore, the Plaintiff can, at the utmost, recover only 142*l.* 5*s.* the moiety. But further, the Defendant is liable only to nominal damages. This is an action only for damages. If the sheriff had assigned the bond, the Defendant would have had a good answer, that the bond, not being made according to the statute, was not assignable, and the sheriff cannot, by retaining the bond, better his situation. *Blackett v. Crissop (a).* The bond was good before the statute 11 *G. 3, c. 19.* All this argument on nominal damages is open to the Defendant. That was an action standing on the old statute of *Westminster*.

The Court proposed a compromise, by the Defendant paying 142*l.* 5*s.*, being one moiety of the 284*l.* 10*s.* which the sheriff would be entitled to recover, if he had taken a bond with two sureties instead of one, in which case each surety would have been liable to one-half.

DALLAS, J. It cannot be argued that the one surety is liable for the neglect of the sheriff in not taking two sureties instead of one; the sole surety already suffers enough in not having contribution. The sheriff undoubtedly ought to have taken a bond with two sureties, in which case each surety would have been liable to one moiety. The terms suggested attain the justice of the case beyond all question.

BURROUGH, J. It is not to be assumed that the Court have decided that the sole surety was absolutely bound by this bond. They decided that he was bound by it, as it is here pleaded, but he did not plead it properly. If he had pleaded that he

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(a) *Lord Raym.* 278.

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delivered the bond as an escrow, until it should be delivered by the other surety, I very much doubt whether he would not have succeeded.

The parties agreed to compromise on the terms proposed by the Court (a).

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(a) It was not adverted to in the argument, how the case might be affected by the remedy over which the single surety had against his principal; for since the sheriff's neglect of duty in not taking two sureties to the bond (taking it to be delivered as a bond, and not as an escrow), was held not to avoid the bond *in toto*, it seems that the effect of that neglect should be only to circumscribe the liability of the one surety within the same limits as those up to which he would have been liable if two sureties had been duly taken. But whether there were one surety or two in the replevin bond, the one has, not less than the two would have, an action against the principal for money paid; and as it only appears in the case, that the principal failed to make return, not that he was insolvent, or unable to pay, *non constat* that if the Plaintiff had recovered judgement for the whole, and the Defendant, the sole surety, had paid it, the latter might not have recouped himself in the whole by his action against the principal; and if there had been two sureties, the obligation of each being to pay the whole, it is clear that the sheriff might have recovered the whole from him whom he should select as the best paymaster, and have left him to recoup himself by a contribution from his co-surety, or an entire payment from his principal, as he might be advised. It could not be known that the principal would fail in the whole, or in any, or what part, to indemnify the surety, till after the surety should have been so damnified, and should have sued the principal, and got judgement on his right to an indemnity, and found no fruit of it; which fact, therefore, as it could not be known at the time when the sheriff sued him on his bond, so it could form no ingredient in calculating the measure of the damages which the sheriff was to recover; the question therefore was, seeing that if the sheriff had duly taken two sureties, the one would have had his two-fold remedy, viz. over against his principal for the entirety, and against his co-surety for a moiety, whether the depriving the single surety of the latter resort, should discharge him from his liability for that moiety, notwithstanding that by the terms of his condition he had bound himself to pay it, and notwithstanding that he had a resort for it to his principal, whereby, for ought that appears, he might have fully recouped himself.

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Feb. 8.

BENSON v. SCHNEIDER.

Though a witness, subpoenaed by both parties, obtain from each, without the knowledge of the other, full payment for his expences and loss of time, the party succeeding is entitled to have his payment to the witness allowed him in his taxed costs of suit.

And that although he made his payment after the witness had been already paid by the other party.

IN this case, which was an action against the Defendant for not loading a sufficient cargo, tried at *Guildhall* before *Burroughs, J.*, two witnesses named *Hurry* and *Comyn*, had been subpoenaed by both parties to come from *Liverpool* to

London,

London, to give evidence upon the trial. Before they quitted *Liverpool*, *Comyn* received from the Plaintiff's attorney a remittance of 10*l.*, and on their arrival in town, the Plaintiff's attorney paid to *Comyn* 15*l.* more, and to *Hurry* 25*l.* They did not then communicate to him, nor did he know, that they were subpœnaed on the behalf of the Defendant, who before the first application to them on the part of the Plaintiff, had also paid them in *Liverpool* 27*l.* each, for their attendance and loss of time, and of which he before the trial apprized the Plaintiff's attorney, with intent that the latter might regulate his payments to them accordingly. The Plaintiff succeeded, and the prothonotary had refused to allow the Plaintiff in his costs the sum he had paid to these witnesses, upon the Defendant's objection, that he had himself already paid the witnesses for so attending.

Shepherd, Solicitor-General, now moved, that the prothonotary might review his taxation. The witnesses were not bound to quit *Liverpool* to promote the Plaintiff's suit till he had paid them what was necessary, and now that he has succeeded, he has a right to have it allowed in costs.

Lens, Serjt., showed cause in the first instance, and admitted, that the Plaintiff's payments to the witness had all been regular; but he insisted that after the Defendant had brought these, who were material and necessary witnesses for him, and had previously furnished them with the means of coming to town, it was a gross imposition practised by them on the Plaintiff's attorney, to obtain a further payment, and he must submit to suffer by the fraud he had sustained. The Plaintiff had a good cause of action to recover the money back from the witnesses; the Defendant had no such cause of action, for he had first subpœnaed them.

DALLAS and PARK, Js. We cannot decide upon that ground against the Plaintiff: we are not bound now to decide whether the Plaintiff can recover back his money or not, but the Plaintiff has properly paid the money; we cannot see that each party, before he causes a witness to be served with a *subpœna*, is bound to inquire of the other party's attorney whether he also had subpœnaed him.

BURROUGH, J. I do not see that any imposition has been practised. Upon a *subpœna*, a witness has a right to have his expenses: their having been paid twice does not affect the question.

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tion. I do not know that the Plaintiff has any cause of action against the witness.

Rule absolute, for the prothonotary to allow these costs (a).

(a) See *Crompton v. Hutton*, ante, III. 230. *acc.*

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STEWART v. FRY.

A., an exceptor of a bill payable at his *London* bankers', remitted their funds to pay it, or take it up if overdue; which last being the case, the bankers, who were bankers in *London*, called on the holders, intending to take it up; but finding the bill was sent back to *Ireland* as dishonoured, they remitted the money back to the acceptor, and, upon a subsequent presentment of the bill, refused payment: Held that this was not such a specific appropriation of the money, as to render the bankers liable to the holder for the amount remitted.

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THIS was an action for money had and received, which, as it appeared upon the trial had at *Guildhall*, at the sittings after *Michaelmas* term, 1817, before *Gibbs*, C. J., was brought under the following circumstances. *M. Codd* had drawn a bill at *Drogheda*, in *Ireland*, for 200*l.*, payable to his own order, on *Richards* and Co. in *Liverpool*, who accepted it, payable at the Defendant's; the drawer indorsed it to *Balfour*, who indorsed and remitted it hither to his agents the Plaintiffs, that they might receive the money. On the day on which the bill became due, it was presented for payment to the Defendants, who refused payment for want of advices; on the same day they received a remittance of 200*l.* from *Aspinalls* of *Liverpool*, with advice of the bill, and a request, "should it have appeared, and been refused for want of advice, to take it up." The Defendants accordingly applied on the next day but one to the Plaintiffs, to take it up, but the Plaintiffs were not then in possession of the bill, having returned it to *Ireland* as dishonoured; and *Aspinalls*, upon being apprized of this fact, recalled the money; after which the Plaintiffs having again obtained the bill, and demanded payment, it was refused. For the Plaintiff it was contended, that there had been a specific appropriation made of this money to the payment of the bill, after which the Defendants were trustees for the Plaintiffs, and were bound to retain the money, and apply it to that purpose; and *De Bernales v. Fuller* (a) was cited, where it was held, that an action for money had and received might *be maintained against bankers with whom money was deposited to take up a bill, and who had never even accepted it upon that trust, but had tortiously applied it to discharge a debt of the deponent to themselves. A verdict passed for the Defendants.

Vaughan, Serjt., in this term had obtained a rule *nisi* to set

(a) 14 *East*, 590. *note*; S. C. 2 *Campb.* 426.

aside

aside this verdict, and have a new trial, when the Court cited *Williams v. Everett* (a) against him.

The Court, stopping *Lens*, Serjt., who would have shown cause, now called on *Vaughan* to support his rule. He urged the circumstance, that the Plaintiffs had called to take up the bill, as conclusive evidence by their own act of a specific appropriation, which, though they need not have assented to in the first instance, they could not, according to *De Bernales v. Fuller*, afterwards repudiate.

DALLAS, J. There is nothing in the case; for when the Plaintiffs called upon the Defendants with the money, they did not know the bill was gone back. There was nothing to restrain the right of the acceptors who made the remittance, or of the Defendants, to make any new appropriation of the money as they thought fit, finding, on application at the counting-house of the Plaintiffs, in order to take up the bill, that the bill was gone back to *Ireland*; and there was no promise or undertaking, express or implied, to hold the remittance for the Plaintiffs' use.

Rule discharged.

(a) 14 *East*, 582.

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BLOSSET, Serjt., moved to amend a recovery, by inserting all and all manner of tithes arising out of four farms called *Chipley Abbey* farm, *Easty Lodge* farm, *Broxted Lodge* farm, and the *Great Lodge* farm, in the parishes of *Hundon* and *Chipley*, in the county of *Suffolk*, upon affidavit that Mr. *Vernon* at the time of suffering the recovery was seised in fee-tail of those farms, amongst other manors, farms, lands, and hereditaments, and also of all manner of tithes, if any, yearly arising, growing, or renewing from and out of those four farms, which were included in the deed and recovery, and which had immemorially been reputed to be tithe free; and that it was the intention of the parties to the recovery and deed to make the tenant to the precipe, to comprize in the recovery the tithes, if any, of those farms and lands, as the deponent believed not only from the recovery having been intended to pass all the estates of *J. Vernon*, of which he had become possessed, but from

Where certain farms had been enjoyed by the tenant in tail and his ancestors beyond memory as tithe-free, but no legal reason for their discharge was known, to account for the enjoyment, the Court permitted a recovery to be amended by insertion of the tithes.

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from the general words, and particularly the word hereditaments, introduced into the release. The deed to make the tenant to the precipe, conveyed, among many other parcels, those four farms, described by their names, and the names of their occupiers, "all which premises," referring to the whole of the parcels, "were situate in the towns, parishes, fields, precincts, or territories" of sixteen vills named, including "*Hundon and Chipley*," and were late in the tenure or occupation of persons therein named; "and all other the freehold manors, farms, lands, tenements, woods, and hereditaments of the releasor, or whereof or wherein he, or any person or persons in trust for him, then had any estate of freehold or inheritance in possession, reversion, remainder, or expectancy, whether under the last will of *J. V.*, or under the last will of *E. V.*, or otherwise howsoever, situate, lying, and being, or arising, in the several towns, parishes, and places thereinbefore named, or elsewhere in *Suffolk*. And all houses, &c., rights, royalties, members, and appurtenances whatsoever to the said manors, farms, lands, hereditaments, and premises belonging or appertaining, or therewith, or with any part thereof respectively held, used, occupied, or enjoyed, or accepted, or reputed, taken, or known, as any part, parcel, or member thereof. There was no express mention of tithes. *Blosset* stated, that *Mr. Vernon* was not aware of any cause originating in ecclesiastical history to make these four farms tithe-free, but no tithe had been in fact paid for any time known, and he urged that therefore the law supposed that there were tithes; and to account for the enjoyments, it must be supposed that the recoverer had a title to them, although they had been unnoticed in the muniments, by reason of long unity of possession. The deed to make the tenant to the precipe was sufficiently ample to include all the tithes, if any such there were, and lest any future claim to the tithes should arise, it was thought necessary that a title to the tithes should be completed. In the case of *Bret (a)*, Demandant; *Smith*, Tenant; *Honeywood*, Vouchee, a rent-charge was permitted to be included in a recovery, by amendment, after one hundred and twenty years apparent merger. On an affidavit that the parties were now alive, which, apparently, was the case in the precedent cited,

The Court permitted the amendment.

(a) *Ante*, I. 484.

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Down and Another v. Down.

Feb. 12.

THIS was an action of trespass on the case, for injury to the Plaintiffs' reversion, brought to decide the title of a certain piece of woodland, called *William's Spring*, situate in the parish of *Datchworth*, in the county of *Hertford*. The cause was tried before Lord *Ellenborough*, C. J., at the *Hertford* summer assizes 1816, when a verdict was found for the Plaintiffs, subject to a case. *Richard Down*, Esquire, deceased, was the father, as well of the Plaintiffs, who were his 3d and 4th sons, as of the Defendant, who was his eldest son and heir at law. *Richard Down* in his lifetime was seised in fee of several farms and lands in the several parishes of *Stevenage*, *Datchworth*, *Welwyn*, and *Tewyn*, in the county of *Hertford*, and, *inter alia*, of a certain farm called *Coltsfoot* farm, and also of two pieces of woodland called *Howe's Wood* and *Bull's Wood*, adjoining to *Coltsfoot* farm, which had been old woods from time immemorial, all in the parish of *Datchworth*. *Coltsfoot* farm consisted of about 172 acres. *William's Spring*, the close in question, was part of that farm, and held as such under the same title, and was so described in a map of the said farm made previous to the same close being planted with acorns as hereinafter mentioned. There are two ways through it, and the way from one part of *Coltsfoot* farm to another, is through this close called *William's Spring*, which immediately adjoins the upper part of it, and abuts on the road adjoining to the lower part of it; and in order to go from the upper to the lower part of the farm persons must go through this close, there being no other way, without going off the farm and by a more circuitous road. *William's Spring*, the close in question, consists of about seven acres, and it being of little or no value to the then tenant, on account of the unfitness of the soil for any agricultural purpose, *R. Down* deceased, about 1783, with the consent of the tenant *Pennyfeather*, whose widow *Mary* afterwards intermarried with — *Field*, had the close ploughed up, and sowed it with acorns: it was fenced in to protect it from cattle, (but still leaving the drove-way through it before mentioned,) and was taken by *R. Down* into his own possession, and so continued to the time of his death, the fences round

Devise of my messuage, farm, and lands, called *C. farm*, situate in or near the parishes of *D.*, *W.*, and *T.*, now on lease to *F.*, at the yearly rent of 150*l.* A close in the parish of *D.*, heretofore arable and part of *C. farm* and occupied with it by the lessee thereof, but for thirty-three years past sown with acorns, and occupied by the owner, and excepted out of two leases of *C. farm*, one prior, the other posterior to the date of the devise, passes by the devise as parcel of *C. farm*.

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round it being repaired, by him from time to time, and the underwood cut in its regular course by him with his other woodlands. Since it has been so planted, 33 years past, it has never been held by the tenant of *Coltsfoot* farm. The close in question was, before it was so sown with acorns, separated from *Bull's Wood* by a ditch and hedge. There is now no hedge between *William's Spring* and *Bull's Wood*, but the old ditch is still remaining between them, to which nothing has been done since the former was planted. In 1803, *Mary Field*, the widow of the former tenant *Pennyfeather*, who had held the farm under *R. Down* and his predecessors, took from *R. Down* a new lease, dated 24th *December* 1803, of the said farm and premises by the description of "All that messuage with the arable, meadow, and pasture lands and grounds thereunto belonging, or now, or lately used, occupied, held, or enjoyed therewith, containing by estimation 172 acres, little more or less, as the same premises are situate, standing, lying, and being in the parish of *Datchworth*, and in the parishes of *Welwyn* and *Tewyn*, Co. *Herts*, and are now in the tenure, use, or occupation of *Mary Field*, and are called or known by the name of *Coltsfoot* farm, (except out of that demise unto *R. Down* and *Rose* his wife, and the person or persons to whom the freehold of the same premises shall from time to time belong), a certain piece of ground part of the said 172 acres, some time since planted by *R. Down* with acorns, and which is now a young wood, called *William's Spring*; to hold, except as excepted, to *M. Field*, her executors, &c., for a term of ten years, under the yearly rents therein mentioned." On 10th *May*, 1813, another lease was granted to *William Pennyfeather*, son and successor of *M. Field*, by the same description, "except out of that demise a certain wood or spring called *William's Spring*." No abatement whatever was made in the tenant's rent by reason of *R. Down* having so taken into his own possession the close called *William's Spring*; and there would not be one hundred and seventy-two acres in *Coltsfoot* farm, if *William's Spring* was not considered as part of it: it would consist, as in the occupation of the respective lessees, under the respective leases before mentioned, if 165 acres only, accurately measured. *R. Down* being seised, on 19th *August*, 1803, made his will in writing, executed and attested to pass real estates, and died in *July*, 1814, without revoking or altering his will. The testator devised to his wife *Rose Down*,
amongst

amongst other premises in the parishes of *Ware*, *Thundridge*, *Datchworth*, and *Stevenage*, his messuage, farm, and lands called *Coltsfoot* farm, situate in or near the parishes of *Datchworth*, *Welwyn*, and *Tewyn*, Co. *Herts*, then on lease to — *Field*, widow, at the yearly rent of 150*l.*, and also two woods or pieces of woodlands, then in his own possession, called *Howe's Wood* and *Bull's Wood*, containing together 34 acres, and upwards, situate in or near the parish of *Datchworth*; to hold, with the appurtenances, unto his wife *Rose Down* for life; and after her decease, he devised to his eldest son *John Down* (with other premises in *Ware* and *Datchworth*) his said two woods called *Howe's Wood* and *Bull's Wood*; to hold unto and to the use of *J. Down* and his heirs; and to his 3d and 4th sons (the Plaintiffs) he devised, in like manner, from and immediately after the decease of his said wife, all and singular his said farms, lands, messuages, cottages, and premises, thereinbefore described, situate in the parishes of *Stevenage*, *Datchworth*, *Welwyn*, and *Tewyn*; to hold unto and to the use of his said two sons *Henry Down* and *Richard Down*, and their heirs, in equal shares and proportions, as tenants in common. The Defendant entered into the close called *William's Spring*, and cut the wood (*a*) growing there, claiming to be entitled to it as heir at law to his father, and as undisposed of by his will. The Plaintiffs claiming to be entitled to it as still being part and parcel of *Coltsfoot* farm (as devisees of their father), in reversion expectant on their mother's decease, brought the present action.

Best, Serjt., for the Plaintiffs, insisted that the devise of *Coltsfoot* farm included *William's Spring*. The words "hereinbefore described" did not so restrict the expression *Coltsfoot* farm as to exclude from it land which had always hitherto been parcel of the farm, merely because it did not happen to be in the occupation of the person to whom the farm was stated in general terms to be in lease. There was in the devise a description of all *Coltsfoot* farm sufficient to carry the whole of it; namely, all that the testator's farm called *Coltsfoot* farm, situate in or near the parishes of *Datchworth*, *Welwyn*, and *Tewyn*, the mere circumstance of the testator's having used further words of description *propter certitudinem addita*, which were not strictly applicable to the whole, but only to a part of the

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(a) This must be intended of timber-trees.

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farm, would not prevent the whole from passing. The expression indeed is peculiar: it is not "now in the occupation of — *Field*," but "now in lease to — *Field*:" *the whole farm, including *William's Spring*, could not be said to be in *Field's* occupation; but the whole may in some sort be said to have been then on lease to Mrs. *Field*; for that may as correctly be predicated in a will as in a lease, and in each of the leases the whole farm is the primary subject of the demise, though the entirety of the subject is afterwards qualified by the subsequent exceptions. Almost every lease contains an exception of timber-trees, and quarries, and mines: many contain exceptions of hedge-rows, bushes, the ground and soil of rivers, roads and woods, rights of way, of sporting, and the like. Could it in such a case be contended, that by a devise of all the testator's farm in the occupation of *A.*, the herbage only should pass to the devisee, and that the trees, hedge-rows, bushes, quarries, mines, ground and soil of rivers, roads, and woods, should descend to the heir; and that the rights of sporting, and of way over the farm, reserved perhaps for the very purpose of the enjoyment of property contiguous to, and devised with, the farm, should descend to the heir of the devisor, to whom no property is given that can render the excepted matters useful to him? The exception proves that *William's Spring* is parcel of *Coltsfoot* farm, for every exception must be of parcel of the thing granted or demised. That it was treated by the testator as parcel of *Coltsfoot* farm, appears, by the leases, wherein the farm is described as 172 acres, to which extent it does not amount, without including therein the land in question. The evidence of the lease made after the will was particularly strong. This case has been decided almost in terms, by the case of *Goodtitle on Demise of Radford* against *Southern* (a).

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Pell, Serjt., for the Defendant, urged first, that thirty-three years' user of the land in question as wood land, and the permitted decay of the hedges which separated it from *Bull's Wood*, and the omission to cleanse the ditch, as well as the circumstance of both woods being cut together, afforded strong evidence that the testator intended that the ground in question should become a part of *Bull's Wood*. The lease to *Pennyfeather* in 1803, does not include *William's Spring* within *Coltsfoot* farm, for it demises the messuage, with the arable, meadow

(a) 1 *Moule & Selw.* 299.

and pasture lands, and grounds thereunto belonging; but *William's Spring*, which was sown with acorns in 1782, and never again broken up, was, in 1803, neither arable, meadow, nor pasture. The only difficulty in the case, is, that the demise proceeds to describe the farm as containing 172 acres, but that difficulty is not insurmountable: there are greater difficulties on the other side: the farm is described as 172 acres; and, deducting *William's Spring*, it is only 165 acres; but it is extremely common to continue the same nominal quantity of acres in succeeding leases, though the land be alienated or varied; but there is an express exception of the close heretofore planted with acorns, and which is now a young wood, called *William's Spring*. The lease, therefore, describes it as a young wood, and there is no demise of any woodland. The second lease of 1813 does not add any further explanation, but the will is made during the first lease. If there be any doubt, the heir at law is entitled to the benefit of it. In that lease is an express exception of the close called *William's Spring*, that close therefore was not in the lease to Mrs. *Field*. The testator then proceeds to give to the Defendant the two woods called *Howe's Wood* and *Bull's Wood*. Therefore, when he gives a remainder to the Plaintiffs, in all and singular his farms thereinbefore described, that means, such as he had before described them, which, as to *Coltsfoot* farm, was only so much thereof as was in lease to Mrs. *Field*. One right on which the Defendant stands, is that of heir at law. But it is not clear, that the testator did not mean to devise *William's Spring* to his eldest son, as a part of *Bull's Wood*. Here is an unprofitable small patch of land adjoining to a larger wood which is devised: the fence has been thirty-two years since destroyed, and the land planted with acorns. *Goodtitle v. Southern* was hastily disposed of, on motion for a new trial, on a question of the admissibility of evidence. Lord *Ellenborough* says, Parcel or not parcel is always a question of evidence for the jury. That case was much considered in the House of Lords in *Oxenden v. Chichester*, and, if the latter be law, the former cannot be law. No case has settled the present question on such impregnable grounds as *Oxenden v. Chichester*. Sir *John Chichester* being seised of two estates, one of which had come to him *Ex parte maternâ*, and the other *Ex parte paternâ*, the maternal estate being partly in *Ashton*, and partly in distant parishes, evidence was offered, that the devisor used to call all his maternal estate by the name

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of his estate of *Ashton*; but this Court first, and afterwards the House of Lords, held, that as there was something to satisfy the words of his will, peculiarly answering to that description, the devise should not be held to include more. *Doe d. Browne v. Greening* (a). Devise of all the estate and interest whatsoever, which I have or can claim, either in possession or reversion, of or in any lands, tenements, or hereditaments at *Coscomb*. The Court held, that evidence was not admissible to show that another estate, the manor of *Farmcott*, formerly distinct, had been since united, and was now held with the testator's lands at *Coscomb*. This case is subsequent to *Goodtitle v. Southern*. The Defendant either takes the premises as heir at law, or as devisee; either of which rights defeats the Plaintiff's claim, and the Defendant mainly relies on his title as heir.

Best, in reply. It is material that the exception in the first lease of *William's Spring* was made before the will, the second after the will, and that it is not an exception in general terms, but an exception for the benefit of him to whom the freehold of *Coltsfoot* farm shall from time to time belong, which now belongs to the Plaintiffs. The Court will reconcile the different clauses, and give effect to the whole. It has been urged for the Defendant, that the words "now on lease to *Field*" circumscribe the devise; but that is answered by the case of *Doe, on Demise of Radford, v. Southern*. The closes were not in the occupation of *Clay*, any more than *William's Spring* is under lease to *Field*, yet the Court held that they passed. The evidence of the two leases is much stronger than the evidence of the notice to quit there was. The cases relied on, of *Doe v. Oxenden*, and *Doe v. Greening*, are materially distinguishable from this. The words "all my lands in *Coscomb*," in the latter case drew a distinct line of separation between the lands at *Coscomb* and the lands at *Farmcott*. *Chichester v. Oxenden* is very materially distinguishable. There were numerous estates scattered over the county, some fifteen miles off; and evidence was offered, that when the testator spoke of his distant estates, he called them all his *Ashton* estate.

Cur. adv. vult.

[351] DALLAS, J. now delivered the judgement of the Court. There is no question in this case as to the admissibility of evidence in order to extend or confine the operation of this will

(a) 3 Maule & Selw. 171.

by evidence extrinsic to it: it is only to be decided on the circumstances. For the heir it is said, that he can only be disinherited by express words or necessary implication. That rule will not be impugned by the decision in the present case. The right of the Defendant to this property is put by his counsel upon two grounds. First, that *William's Spring* passed to himself as a part of *Bull's Wood*; 2dly, that it was undisposed of by the testator's will, having ceased to be part of *Coltsfoot* farm, and therefore descended to the Defendant as heir at law. There is no ground whatever to say, that by ceasing to be part of *Coltsfoot* farm it became a part of *Bull's Wood*; for if so, there would have been no reason for the exception, whereby in two leases the owner treats it as a part of *Coltsfoot* farm. The will was intermediate in time, between the two leases. It is therefore clear that at the time of making his will, the testator thought it a part of *Coltsfoot* farm, and not only did not at that time mean to die intestate as to this property, but contemplated it as a part of *Coltsfoot* farm, as it was then demised to *Field*, subject to the exception of *William's Spring* out of that demise. The judgement must therefore be

For the Plaintiffs.

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A RECOVERY had been suffered of (*inter alia*) 350 acres of land, 100 acres of meadow, 50 acres of pasture, 65 acres of wood, 20 acres of furze and heath, 10 acres of alder, with the appurtenances, in the parishes of *Tandridge* and *Godstone*, and the tithes of corn, grain, and hay, yearly arising, growing, and renewing from and out of the said premises, and also the advowson of the vicarage of the church of *Godstone*. The deed to make the tenant to the precipe convey (*inter alia*) all tithes of corn, and grain, and hay, yearly coming, growing, &c. out of, and upon, and from all or any of the said lands, hereditaments, and premises thereby granted, and all other the amendment by adding all manner of tithes in *T.*, the recoveror being seised thereof, and intending they should pass.

Where a deed to make a tenant to the precipe conveyed tithes of corn, grain, and hay in *T.* and *G.*, and all other hereditaments of the recoveror within the county, and the recovery was of the tithe of corn, grain, and hay only, the Court permitted an

Where one purchaser under a recovery had obtained an amendment of the recovery, so worded, that by its collocation on the record, it destroyed and rendered insensible the title of another purchaser under the recovery, the Court, upon motion of the latter, rectified the mistake.

Remainder-man in tail heard to show cause against the amendment of a recovery.

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hereditaments of *Ann Boone* and *Ann Eliza Boone* in *Tandridge* and *Godstone* aforesaid, or elsewhere in the county of *Surrey*. *Shepherd*, Solicitor-General, in last *Michaelmas* term moved to amend this recovery by inserting next after the word "hay", the words "all manner of other tithes," upon an affidavit that the tenants in tail were seized, not of the tithes of corn, grain, and hay only, but of every other species of tithe arising upon so much of the premises as lay within the parish of *Tandridge*; and inasmuch as the deed to make the tenant to the precipe conveyed all the hereditaments of the relessors in *Tandridge* and *Godstone*, or elsewhere in the county of *Surrey*, it clearly conveyed these tithes, though not enumerated in express words; and it was sworn the parties believed they were intended to pass, and the enjoyment of them had gone accordingly since 1776. Under a grant so extensive as this, similar amendments had been frequently permitted.

Best, Serjt., for a tenant in tail showed cause. This recovery ought not to be amended; 1st, because the parties are dead; 2dly, because, though it has often been held that the general words hereditaments will pass tithes, yet here are words to control the extent of the tithes: the deed to make the tenant to the precipe limits the tithes to corn and grain, which affords a strong presumption that no other tithes were intended to pass thereby, *expressio unius est exclusio alterius*; and there is no case where, the deed specifying particular tithes, the recovery has been amended by inserting all tithes.

The *Solicitor-General*, in support of his rule, urged that the enjoyment had long gone with the title, and that by the deed, all hereditaments in *Tandridge* and *Godstone*, or elsewhere in the county of *Surrey*, would clearly pass.

GIBBS, C. J. Considering those large terms in the deed to lead the uses, I think we may allow the amendment.

In consequence of this permission, the recovery was altered, by inserting after the word "hay" the words prayed for, so that the recovery now stood "the tithes of corn, grain, and hay", "and all other tithes yearly growing, arising, and renewing, from and out of the premises in the parish of *Tandridge*," "yearly arising, growing, and renewing from and out of the said premises."

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Best, for the party who had opposed the amendment, now moved, with costs, again to amend this recovery by transposing the words "and all other tithes yearly arising, and growing and

and renewing from and out of the said premises in the parish of *Tandridge*," and inserting them after the word "premises" in the recovery, instead of after the word "hay," as before directed, so that it might stand as a recovery of the tithes of corn, grain, and hay only, yearly arising from the premises, which extended into the two parishes, and that, so far as it was a recovery of all manner of tithes, it might be limited in its operation to so much of the premises as lay within the parish of *Tandridge*; for that his own client had purchased the tithes of corn, grain, and hay, arising from so much of the premises as lay within the parish of *Godstone*, and the amendment of the other party had made his client's title insensible; it was necessary to bring the other party before the Court, because the amendment now prayed might affect his title. The other party, instead of using the order of the Court, to draw up the amendment in such terms as would answer the purposes of both parties, had so drawn it up, as to answer the purpose of neither. He had not the deeds in Court, but he insisted there is no occasion for them here, inasmuch as it appeared on the recovery itself, that the recoverors had made their own record insensible by the amendment; and his client did not complain of the amendment as ordered by the Court, but he complained that the other party by introducing the words in a wrong place, had injured him, who was the proprietor of the tithe of corn, grain, and hay in *Godstone*, and, by excluding his tithes from the comprise of the recovery, in which they were included when he purchased them, they had destroyed his title.

The *Solicitor-General* disclaimed all title to the small tithes in *Godstone*, and consented to any amendment which should not prejudice his client.

The Court permitted the amendment to be made as now prayed for, by introducing the first amendment after the word premises, instead of inserting it in the place where it then stood.

Rule Absolute, but without costs. The recoverors to pay their own costs.

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MOODIE v. REID and Others.

Limitation of stock to the use of such person as *S. C.* should by her last will or any writing or appointment in nature of a will, to be by her signed and published in the presence of and attested by two or more credible witnesses, appoint. An appointment by will was thus made: "These my last bequeaths, signed by me this 4th Feb. 1812, *S. M.*; witness *B. H.* and *J. H.*" The testatrix told each of the witnesses that that paper was her will. Held that this was not a sufficient execution of the power.

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THIS was a case directed by the Vice-Chancellor for the opinion of this Court, the material parts whereof were these. By indenture of marriage-settlement made between the Plaintiff of the first part, *Sarah Moodie*, the Plaintiff's late wife, then *Sarah Crowther*, of the second part, *Ann Richardson* of the third part, and the Defendants *A. Reid*, and *W. Saunders*, and *B. Crowther*, and *J. James*, both since deceased, of the fourth part; it was declared that the trustees therein named should stand possessed of the several sums of 200*l.* and 2500*l.* 3 *per cent.* reduced bank annuities, upon trust, in case there should be no child of the marriage then contemplated, as to one moiety thereof, for the Plaintiff, his executors, &c., and as to the other moiety thereof, in trust for the use and benefit of such person or persons, and for such estate and estates, intents, and purposes, and *subject to, with, and under such charges, &c., and in such manner, as *Sarah Crowther* at any time or times during her life, by any deed or deeds, instrument or instruments in writing, to be by her sealed and delivered in the presence of two or more credible-witnesses, or by her last will and testament in writing, or any writing or appointment in the nature of a will, to be by her signed and published in the presence of, and attested by, two or more credible witnesses (and which deed and writings, and will, or writings in nature of a will, notwithstanding her then intended coverture, she was thereby empowered to make), should direct or appoint, and in default of such direction or appointment, &c., upon trust for the person or persons who would have been entitled thereto, in case the said *Sarah Crowther* had died sole and unmarried, intestate, and possessed thereof. The marriage was solemnized, and the sum of 2500*l.* three pounds *per cent.* reduced bank annuities, was transferred into the names of the trustees. *Sarah Moodie* in her lifetime duly made and published her last will and testament in writing, or appointment in writing, in nature of a will, dated 4th *February*, 1812, part of which was in the following words: "I, understanding by our marriage-settlement, that should my husband survive me, and we then leave no child living, half the sum of 2700*l.*, (the amount of the two sums of 2500*l.* and 200*l.*) now in the 3 *per cent.* reduced annuities, is already settled on my husband during

during his life, and that I have a power by that settlement to dispose of the other moiety, being 1350*l.*, to whatever person or persons I think proper; that sum, I now, by this writing, bequeath to my husband Dr. *John Moodie*, for his sole use and entire disposal. It is my earnest hope and trust that no means will be taken by any of my family to set these my bequeaths aside, even should it be found that due forms are wanting to render it properly valid according to law. These my last bequeaths signed by me this 4th day of *February*, 1812. *Sarah Moodie*. Witness, *Betty Headington*. *Jane Headington*." *S. Moodie* died in 1813, without ever having had any children or child, and letters of administration of her effects with the said will, or writing in nature of a will, annexed, had been granted to the Plaintiff, who exhibited his bill in Chancery against the Defendants *A. Reid* and *W. Saunders*, the surviving trustees of the settlement, and also against the other Defendants, who were the next of kin of *Sarah Moodie*, and prayed that the trustees might be directed to transfer to the Plaintiff, for his own use, the whole sum of 2500*l.*, and 200*l.* 3 *per cent.* reduced bank annuities. *Betty Headington* and *Jane Headington*, the two witnesses to the will, or appointment, were examined on the part of the Plaintiff, and each of them, in her deposition, states that *Sarah Moodie* signed or subscribed her name to the will, or appointment, in the presence of the witnesses. And *Betty Headington* further says, "that from what *Sarah Moodie* said in her presence and hearing on that occasion, the deponent understood that the said paper-writing was her will." And *Jane Headington* also says, "that from the expressions made use of by *Sarah Moodie* at the time of her so signing the said writing, she the deponent understood that such writing was the will of *Sarah Moodie*." The question was, whether the above-stated will, or appointment in nature of a will, was a due execution of the power contained in the settlement.

This case was argued in *Michaelmas* term, 1816, by *Best*, Serjt., for the Plaintiff. He insisted that the execution, thus attested, was a due publication of the will, and satisfied all that the power required, and that it formed no objection that the attestation did not expressly notice the publication as well as the signing, because it noticed that which could not exist without publication, namely, the signing. He distinguished this case from that of *Wright v. Barlow* (a), which only decided that an

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(a) 3 Maule & Selw. 512.

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attestation of sealing was not an attestation of signing. He also referred to *Bond v. Seawell* (a), where no question was made, but that the testator's informing the witnesses separately, that the paper attested was his will, was held a due publication. A formal publication of a will was not necessary. No particular form of words was required. *Westbeeck v. Kennedy* (b) (in which all the cases on this point are collected), and where it was held that actual signing in the presence was unnecessary.

Lens, Serjt., for the Defendants. The case of *Bond v. Seawell* is inapplicable. There, indeed, it was held not to be necessary that the testator should publish to the witnesses that the instrument is his will. But that publication which the law requires refers to the future operation of the instrument as a will. It is not therefore *ad idem*; for the publication which this power requires is a publication of the will to the witnesses. It is there said not to be necessary that they should know it is a will; but that proposition may be doubted, for, if they do not know that fact, how can it, in common sense, be said that they attest the execution of it. Whatever formalities are prescribed to the execution of a power however fanciful, must be strictly complied with. In the case of *The Duke of Albemarle v. Monck* (c) it was held that though by the statute of frauds it is required that a will must be attested by three witnesses only, yet that a fanciful declaration that it shall be attested by six peers, must be complied with. *Powell*, J., says (d), "I know not any rule more clear in our law-books than this, that all the circumstances prescribed and required in a power of revocation, must be observed, to make it a good and effectual revocation; so is *Scroop's* case (e), so is the case of *Kibbett v. Lee* (f). There is indeed a favourable judgement to be given in expounding powers; but both those cases still agree that all the circumstances must be strictly observed." This case does not rest, therefore, on the question, what is a publication with respect to the operation of a will? but on the point, what is a publication to the witnesses? If they were to attest this paper in the terms, "signed in presence of us, but what this paper is, we do not know," the Court could never say that was a publication. The Court came reluctantly to the conclusion which they adopted in *Wright v. Wakeford* (g); yet they thought the distinction between the exe-

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(a) 3 Burr. 1773.

(b) 2 Ves. & Beames, 362.

(c) 3 Cha. Ca. 65. 2 Freem. 193.

(d) 3 Cha. Ca. 65.

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(e) 10 Co. 143.

(f) Hob. 312.

(g) Ante, IV. 213.

cution of powers and other deeds so strong, that they were forced so to rule; and a statute (a) which has since been made to redress that particular case, leaves all others as they were, as this Court held in the case of *Doe, on Demise of Hodgkiss, v. Pierce* (b). That case of *Wright v. Wakeford* proceeds on the ground that when three things were required, all three must be complied with; and though it was said, that from sealing, signing might be inferred, as, possibly, it in some cases may, yet it is not dispensed with. The reason is, that the appointor has, as it was held in *The Duke of Albemarle's* case, no power, but what arises from the authorities from which it flows. *Doe, on Demise of Mansfield, v. Peach* (c) and *Wright v. Barlow* are decisive for the Defendants. Nothing here shows that all the ceremonies have been complied with: the substantial ceremony of attesting the publication has not been complied with.

Best, in reply. The opinion of *Mansfield, C. J.*, in *Wright v. Wakeford*, and the doubts thrown out by Lord *Eldon*, Chancellor, when the same case was before him (d), afford an argument which ought to weigh with the Court, not to carry the doctrine of those cases further than the cases themselves go. The Plaintiff does not seek to break in on the authority of *The Duke of Albemarle v. Monck*. If a person were to insist on the attestation of a will by three *European* emperors, though only two exist, the power would indeed be impossible to be pursued, but no will could take effect without that formality. A will without publication is not good; publication is that which gives effect to a will, as delivery gives effect to a deed; but it is not necessary the testator should at that time declare his publication. Whatever gives assent to an instrument, is a publication of it. If a testator writes a will, the act of writing shows it to be his; if written by another, the testator must do something more; he must show that he adopts it, which he does by his signature. Neither can a person sign a will, nor call upon another to witness that he is signing it, without publishing it as his will. And the Plaintiff is not contending that the Court can dispense with either formality, but he contends that the signature is evidence of publication.

GIBBS, C. J. We will certify to the Vice Chancellor, but I think it necessary to say a few words on this case. Let us go

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(a) 54 *Geo. 3. c.* 168.(b) *Ante*, VI. 402.(c) 2 *Maule & Selw.* 576.(d) *Wright v. Wakeford*, 17 *Ves.* 454.

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back to the origin of wills. A will of land, in its present extent, can only be made by *the statute of *H. 8. (a)*, although I am aware, that wills existed before the statute of *H. 8.* of lands devisable by customs, and that the writ *ex gravi querelâ* existed for the recovery of those lands; and to such will I think, indeed I know, that publication was not necessary. The statute of 29 *Car. 2. c. 3. s. 5.* made certain formalities necessary to wills of land, but I know that neither the statute of *H. 8.* nor that of 29 *Car. 2.* speak of publication. A will, as such, requires no publication; be publication what it may, a will may be good without it. But here the power is to be exercised by a will signed and published. Therefore there must be some publication here: the will must be signed, published, and attested; and there must therefore be some attestation here, of signing and publication. Though the most respected late Chief Justice of this Court differed from the other judges in *Wright v. Wakeford*, it is established by that case, that the witnesses must attest every thing that is necessary for the execution of the power. Here the witnesses have clearly attested the signing; the question is, whether they have attested the other formality, of publication, in attesting the signing. If the act of the testatrix in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also, because they attest that by which she publishes it. I called on the bar to say what publication was; I do not wonder that I had no answer; for though the parties use the term publication, it is a term, in this sense, unknown to the law. I know what publication is, if spoken of many things; as for instance of a libel. I know what an uttering is; if a man puts forth base money, in certain cases it is an uttering; but I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will. I throw this out, that it may not be supposed, that if our decision should be adverse to that which has been argued, it is therefore contrary to the cases that have been decided in this Court. *Cur. adv. vult.*

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The Judges afterwards certified to the Vice-Chancellor, that the will of *Sarah Moodie* was not a due execution of the power contained in her settlement.

(a) 32 *H. 8. c. 1. s. 1.*

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CRUMP, on the Demise of WOOLLEY, v. NORWOOD (a).

THIS was an ejectment tried at *Maidstone* summer assizes, 1814, before *Heath, J.*, when a verdict was found for the Plaintiff, subject to a case, of which *the only parts material to the judgement of the Court were as follow. In 1760, *Robert Cox* being seised in fee of the premises, which were subject to the law of gavelkind, by his will, duly executed and attested, devised them to his wife, for her life, and after her decease, or future marriage, he devised the premises unto his nephews *William Cox* of *Harrietsham*, *John Cox*, and *Robert Cox*, three of the sons of his brother *John Cox*, equally between them, during their respective natural lives, as tenants in common; and after their several and respective decease, he devised the part and share of him or them so dying, in the premises, unto the heirs lawfully issuing of his and their body and bodies respectively, and if more than one, equally to be divided, and to take as tenants in common; and if but one, to such only one, and to his, her, or their heirs and assigns for ever. And if any of his said nephews should die without such issue, or, leaving any such, they all should die without attaining twenty-one, then he devised the part and share of him and them so dying, unto the survivor and survivors of his said nephews, and the heirs of the body of such surviving and other nephew, equally, as tenants in common, and to hold the same as he had thereinbefore directed as to the original part and share, and with the like contingency of survivorship on failure of issue. And for want, or in default of such issue of his said nephews, he devised the premises unto his own right heirs. The testator died; leaving the said *John Cox* his brother, and *William Cox* of *Langley*, son of his other deceased brother *William Cox*, his heirs in gavelkind. His wife, *Ann Cox*, died in 1776, the three nephews and devisees survived both the testator and his wife

Devise of gavelkind land to the testator's three nephews, sons of his brother *John*, during their lives, in common, and after their respective decease the part and share of him or them so dying, unto the heirs lawfully issuing of his and their body and bodies respectively, and if more than one, equally to be divided, as tenants in common, and if but one, to such only one, and to his, her, or their heirs; and if any of his nephews should die without such issue, or leaving any such, they all should die without attaining twenty-one, then the share of him and them so dying, unto the survivor and survivors of his said nephews, and the heirs of the body of such surviving and other nephew, equally, in common. And for want, or in

default of such issue of his nephews, unto his own right heirs. One moiety of the ultimate remainder in fee descended, upon the testator's decease, to the father of the three nephews, being one of the testator's two heirs in gavelkind, and from him to the three nephews: Held, 1. That this was not an executory devise, but a contingent remainder with a double aspect; 2. That by the descent of a portion of the ultimate remainder in fee, the nephew's particular estate in that portion was merged, and the contingent remainders which were supported thereby, were, as to that portion, also destroyed.

(a) The reporter was unable to procure the terms of this special case at the time when the other cases of the same term were published.

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[and their father *John Cox*]; and the lessor of the Plaintiff sought to recover by that ejectment one moiety of the one-third part which passed under that will to **William Cox* of *Harrietsham*, the nephew of the testator, who died without issue in 1802. Upon the death of the testator's wife, *William Cox* of *Harrietsham*, *John Cox*, and *Robert Cox*, the nephews and devisees of the testator, entered into the possession and receipt of the rents of the devised premises. *John Cox* the nephew died in 1780, intestate, leaving one only son named *John Cox*, his heir at law. The last named *John Cox* having attained twenty-one years in 1791, by his will duly executed and attested, devised his undivided third part of the premises unto his wife, during so many years as she should live a widow and unmarried, and after her decease or marriage, he devised the same unto *R. Pope* and *J. Simmons* and their heirs, in trust to sell; he died in 1792, leaving his sons *Robert* and *William* his heirs in gavelkind. In *January* 1802, *William Cox* of *Harrietsham*, the nephew and devisee, died without ever having had any issue, leaving his brother *Robert Cox*, who was still living, the only surviving nephew and devisee. By lease and release made 1st and 2d *June* 1803, between *Robert* and *William Cox*, the grandsons of *John Cox* the nephew, of the first part, *R. Pope* and *J. Simmons* of the second part, and *T. Lomas*, and the Plaintiff's lessor, of the third part, reciting the death of *William Cox* of *Harrietsham*, whereby one-third part of the premises vested in them, *Robert Cox* and *William Cox* (parties thereto), or in *Simmons* and *Pope*, by virtue of the will of *John Cox*, son of *John Cox* the devisee, *Simmons* and *Pope*, at the request of *R. Cox* and *W. Cox*, did grant and convey, and *Robert Cox* and *William Cox* parties thereto, did release and confirm to *Lomas* and *Woolley*, all that one undivided third-part of and in the premises, which *William Cox* the nephew and devisee deceased was seised of in his life time, to hold to *Lomas* and *Woolley*, their heirs and assigns, to the use of *Lomas* and *Woolley*, and of the heirs and assigns of *Lomas* for ever; nevertheless, as to the estate of *Woolley* and his heirs, in trust for *Lomas* and his heirs. *Lomas* was dead, leaving *Woolley*, the lessor of the Plaintiff, surviving. The Defendant defended for only eleven-twelfths of the property. The question for the opinion of the Court was, whether the lessor of the Plaintiff was entitled to recover any other part of the premises in question than the one-twelfth part thereof, for which no defence had been made? If the Court should be of opinion that he was, the verdict was to be entered

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for the Plaintiff, for such part accordingly; if not, judgement of nonsuit was to be entered.

Best, Serjt., for the Plaintiff, insisted that he was entitled to recover one-sixth part of the premises, namely, the moiety of that one-third part which was devised to *William Cox*, of *Harrietsham*, and which upon his death descended to *Robert* and *William Cox*, the grandchildren of the nephew *John Cox*. He contended that by the limitation in the will of *Robert Cox*, the testator, the nephews took a life-estate, and the heirs of the bodies of the nephews took a remainder in fee, as purchasers, in common. That this was so, appeared by the cases of *Doe on Demise of Long v. Laming* (a), which, like this, arose upon a case of lands in gavelkind, and which is distinguishable from this, only in a circumstance, on which Lord *Mansfield*, C. J. did not solely rely, that the heirs of the body of *A. C.*, to whom it was given, were to be as well females as males: he proceeds to show, that the expression heirs of the body, which first occurs, is a word of purchase. In *Doe, on Demise of Strong, v. Goffe*, upon a devise to *Mary*, and to the heirs of her body, lawfully begotten, or to be begotten, as tenants in common, it was held, that her children took a remainder in common as purchasers. This was not a substitutionary contingent remainder, but an executory devise; and if so, the supposed destruction of the remainder by the union of the greater with the lesser estate, had no place. There was not that danger now to be apprehended from executory devises, which former judges had foreseen, inasmuch as they are now restricted to such as take effect within a life or lives in being, and twenty-one years after. It squares with the intention of the testator (which was, that his nephews should take in succession, and that no part of the land should go over, so long as any of them remained) to construe this as an executory devise. *Gulliver v. Wicket* (b), though loosely reported, is recognized in subsequent cases as law, and is decisive of the present case. *R. Waith* devised to his wife for life, and after her death, to such child as she was then supposed to be ensient with, and to the heirs of such child for ever; provided, that if such child as should happen to be born, should die before the age of twenty-one years, leaving no issue of its body, the reversion of one-third of the said lands should go to his wife and her heirs, one-third to his sister *Elizabeth*, and her heirs,

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(a) 2 Burr. 1100.

(b) 1 Wils. 105.

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and the other third to his sister *Ann*, and her heirs. *Lee, C. J.*, says, "here is a good devise to the wife for life, with remainder to the child in contingency in fee, with a devise over, which we hold to be a good executory devise, as it is to commence within twenty-one years after a life in being." Here a complete fee is given to the first child of the nephew; nothing further, therefore, can be limited by way of remainder, but it may take effect as an executory devise. An ulterior limitation, to take effect as a remainder, must immediately follow the determination of the particular estate. *Pells v. Brown (a)*, and *Marks v. Marks (b)*, are in point. These cases all establish the proposition, that where the interest which is given is not a substitutionary fee, the limitation must be an executory devise, and not a contingent remainder. *Luddington v. Kime*, as reported in *Salkeld (c)*, and *Lord Raymond (d)*, is the case of an executory devise. That was a devise to *E. Armine* for life, and in case that he should have any issue male, then to such issue male and his heirs for ever, and if he should die without issue male, then to Sir *T. Barnardistone*, and his heirs for ever. Best also cited *Fearne (e)*. In *Parkhurst v. Smith (f)*, *Willes, C. J.*, says, "there are two sorts of contingent remainders, that do not vest, the second of which is, where the commencement of the remainder depends on some matter collateral to the determination of the particular estate, as, for instance, if there be a limitation to *A.* for life, remainder to *B.* after the death of *J. S.* There is but a mere possibility that an interval may occur between the death of *A.* and the death of *J. S.*, yet that possibility prevents its being a good particular estate, to support a contingent remainder to be limited thereon. Here, though a child of the nephew be born, it is possible that he may die before twenty-one, and until that time, therefore, the estate is defeasible. Consequently, it cannot be good as a contingent remainder; it is either void, or it is an executory devise, according to the doctrine of all the cases; and the intent of the testator is clearly favourable to the Defendant. This is not a substitutionary fee, because the whole fee is given away, and yet, in certain events, the fee first given may take effect, and, nevertheless, the subsequent limitation may in certain events take place after it.

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Onslow, Serjt., contra. This is not an executory devise, but

(a) *Cro. Jac.* 592.(b) 10 *Mod.* 419.(c) 1 *Salk.* 224.(d) 1 *Ld. Raym.* 203.(e) *On Executory Devises*, p. 92. of edition of 1795.(f) *Willes*, 388.

a remainder

a remainder; and if it can be construed as a remainder, the Courts will favour that construction. It has all the qualities of a contingent remainder. First, there is an estate for life to support it. Secondly, it possibly may take effect on the determination of the preceding estate, though it certainly may open and let in another: it is, as held in *Doe, d. Comberbach, v. Perryn (a)*, a contingent remainder in fee, subject to be defeated by opening and letting in the estate of those who may be born afterwards. The case of *Gulliver v. Wicket* called for no decision on the point whether it should be an executory devise or a contingent remainder, but the question merely was whether the ulterior disposition should at all take effect. So, in *Pells v. Brown*, beyond a question, the fee limited after a fee could not be supported as a remainder; the only question was, whether it could be supported at all. In *Parkhurst v. Smith*, the question was not, whether there was an executory devise, or a contingent remainder, but whether the remainder were vested or contingent. It may be a good executory devise in one case, and a good contingent remainder in another. Though both estates are given to the same person, yet there are two estates; and the one may be good, the other not. Suppose a devise to *A.* for life, remainder to the first son of *A.* in fee: but if the first son of *A.* die under twenty-one, then to *X.* in fee; and if there be no son of *A.*, then to *W.* in fee. Here are two different estates, and two different devisees; and the devise to the one may be good, to the other may be bad, and it makes no difference, though both estates are given to one person. There was only one other point, namely, whether this devise might not create an estate tail in the nephews of the testator. Against this proposition the Plaintiff's counsel had relied on *Doe v. Laming*. But that case was materially different, not only because there the estate was expressly given to the females, who could not be heirs in gavelkind, as well as to the males, but also, as Lord *Mansfield* notices, because they were made tenants in common; whereas the land, by the course of descent in gavelkind, would go to them as coparceners. Here the devise is to the heirs of the bodies of the nephews equally, which means the heirs in gavelkind, and is therefore confined to the males, so long as there are any males, and therefore there is not the same objection to construing this an estate tail. *Strong v. Goff* is inapplicable. *Doe, on Demise of Blandford, v. Applin (b)*, favours the

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(a) 3 Term Rep. 484.

(b) 4 Term Rep. 82.

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opinion, that the nephews here took an estate tail; but he mainly relied on the point, that this was a contingent remainder.

Best, in reply, denied the application of *Doe v. Applin*, and *Doe v. Perryn*: the latter was decided upon the principle that the ultimate remainder was not to take effect till after the indefinite failure of issue. In *Gulliver v. Wickett* there were no children, so that according to the Defendant's argument, that would have been a contingent remainder; and it may be admitted that it would have been such if the testator had stopped after the devise to the unborn child without adding the proviso for the estate to go over if the child died under twenty-one; but the Court there hold it an executory devise, and not depending on the fact whether a child be born or not, but depending on the circumstance, that there may be children born, who may have an indefeasible estate; and the devise over, if the children shall die under twenty-one, comprises in it the remainder over if there shall be no children: it is all one limitation. In *Pells v. Brown* the devise is, if *Thomas* died without issue, living *William*; so here, if either should die, leaving children, and they all should die without attaining twenty-one: the words are different, the effect the same. The devise is not merely to the survivor of the three brothers, but to the survivor jointly with the heirs of any dead brother: the words of the will are "to the survivor and survivors, and the heirs of the body of such surviving and other nephew": every word must be effectuated, which can only be done by giving a portion to the heirs of the body of him who may have died leaving issue. If all had died leaving issue, how would the estate have gone?

Cur. adv. vult.

GIBBS, C. J., on this day delivered the judgement of the Court. After stating the devise, and the remainder to the right heirs of the testator, he observed that those were the only material parts of the will, as it affected the present question. This was an ejectment brought for a moiety of the third part, which was devised to *William* the eldest nephew. Therefore his Lordship would state the interest which *William*, and his children after him, took in the premises. The devise is to *William* for life, and if he has children (for heirs here means children), then to them in fee: if he has no children, then the estate goes to the testator's nephews *John* and *Robert*. It is admitted on all hands, that this is the true construction. [His Lordship then proceeded to state the facts of the case.] He observed that the time

of

of the decease of *John Cox* the brother of the testator was not stated; but whensoever he died, certainly a portion of the reversion which was vested in *John*, descended on *William* his eldest son. What that portion was, it *was unnecessary for the Court to enquire, because the counsel had agreed amongst themselves to determine what was the portion of the reversion which the parties took, if the Court would determine the principle. In *January*, 1802 *William Cox* died; and if the contingent remainder was not previously destroyed, his third part then clearly passed to *John* and *Robert*, the surviving devisees. It is admitted that the share sought to be recovered well passed to *Woolley*, unless the contingent interest, which the deeds stated in the case purported to convey, was destroyed by the descent of a moiety of the estate to *William*. It was unnecessary therefore to go into the effect of those deeds. It was admitted also, that a portion of the reversion descended on *William*. So that the only question was, whether that descent of a portion of the reversion destroyed the contingent remainder *pro tanto*. The lessor of the Plaintiff insisted that no destruction of any part of the contingent interest was occasioned by that event, and that he took as large a portion as descended to *John*. The Defendant contended, that this was a contingent remainder, descending on *William*, which required a particular estate to support it; and that the particular estate being merged in the fee, the contingent remainder was destroyed with it. The Plaintiff says, the contingent interest was not destroyed by unity of estate, because it was not a contingent remainder, but an executory devise; for it was not to take effect but on the decease of the children of the first grantee under 21, and therefore was not supported by the particular estate given to *William*, because it was not to take effect on the decease of *William*. These are the points on which the case depends. On the decease of *William* it must be determined whether he has children, who are to take in the one event, or whether the persons, who are to take in the event of his having no children, are to succeed. This must be determined on the decease of *William*, and as a contingent remainder may be limited with a double aspect, where one or the other of two limitations must take effect on a certain event, I see no reason why this should not fall within that class of cases. But it is said, it cannot be so, because there is one event which may not then take effect; namely, that of the nephews having children, and the children dying under 21, after the decease of

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the tenant for life. It is true that it may so happen: but that is not the event which has happened, and I can find no principle, on which we are called on to determine, that because there are two limitations, depending upon several events, one of which may possibly not take effect within the limits which the rule of law prescribes, therefore the other, dependent on an event which necessarily conforms to the rule of law, shall not be effectual, if that event happens. This is the conclusion to which the Court have come on arguing the case on principle; but it does so happen, that a case precisely the same in all its parts with this, has happened in modern times, which was not mentioned on the argument at the bar; *Doe, on Demise of Dary, v. Burnsall (a)*. That was in substance a devise to the testator's niece *Mary Owstwick* for life, and if she should have children, remainder to them in fee; if none, or if, having children, they should die under twenty-one, then remainder over to the testator's cousin *Peter Dary*. That is precisely like this case. *Mary Owstwick* suffered a recovery, and it was agreed that the contingent remainders over were destroyed. Lord *Kenyon*, C. J., says, "The devisor seems to have reasoned thus: If the children of my niece live to attain twenty-one, when they will be qualified to dispose of this property prudently, I give it to them in fee: if they happen to die under twenty-one, and without leaving issue, then I will consider to whom I can best dispose of the estate, and in such an event I give it to my collateral relations. That brings the present case within *Loddington v. Kime*, which is the leading case upon this subject, and converts all the subsequent limitations into contingent remainders. Those depended on the particular estate given to the niece; and she having destroyed this particular estate before they could take effect, they consequently fell to the ground. Perhaps the devisor was not aware that the niece could destroy the estate given to her children; but the Plaintiff's argument goes to admit that she had that power, and it is a necessary consequence of our putting such a construction on the will as best will effectuate the intention of the devisor." At the conclusion, Lord *Kenyon* says, "I proceed on the words of the will, giving effect to every word contained in it, and they all lead to this conclusion, that this was a contingency with a double aspect. If *M. Owstwick* had any children, the estate was limited to them in fee; so here, if *William* had children, the estate would go to them in fee. If she had no children, or

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(a) 6 Term Rep. 50.

if, having children, they died under twenty-one, and without issue, then it was to go over to the lessor of the Plaintiff. Here, too, in like manner as in that case, "all these rested in contingency, and the particular estate of freehold by which they were supported having been destroyed before they were capable of taking effect, the contingent estates limited over are destroyed with it. On precedent, therefore, as well as on principle, we think so much of the contingent remainder as was co-extensive with the portion of the reversion which descended to *William* the nephew and devisee for life, was thereby destroyed. It is unnecessary for us to go into the consideration what that portion was, as the parties have agreed to settle it among themselves.

Judgement for the Defendant.

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THE Plaintiff declared that on 19th *March*, 1779, *William Taylor*, then being sole proprietor of the Opera-house, or *King's Theatre*, in the *Haymarket*, and having full authority to grant and sell the ticket thereafter mentioned, by indenture between him and *Jacob Gourgas*, in consideration of 225*l.* paid by *Gourgas* to *Taylor*, granted to *Gourgas*, his executors, administrators, and assigns, six silver tickets of admission to the Opera-house, or theatre, and gave and granted to the respective bearers thereof, to be admitted *gratis* into any part of the theatre (the boxes and other places which were, or during the term should be, occupied by subscribers to the Opera, and the boxes reserved for the use of the proprietors and their assigns, excepted), to be present at, and see all operas, exhibitions, and other public entertainments (the concert of ancient music excepted) there to be had during the respective terms of twenty-one years, or twenty-one seasons, from 24th *June*, 1797; which six silver tickets were then already made and engraved as in the declaration was minutely described, one whereof was numbered 471; to hold the same tickets with such free license, &c. to *Gourgas* and his assigns,

A beneficial licence to be exercised upon land, may be granted without deed.

And without writing.

A license to be exercised upon land for twenty-one years, granted for a valuable consideration, and acted upon, cannot be countermanded.

A party conveying to trustees an estate in land, connected with an intricate establishment, which, after the conveyance, he continues to manage without their interference, held to

have authority from the trustees to bind them and the land by all acts in the ordinary management of the establishment.

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for the term of twenty-one years, or twenty-one seasons, and with power to sell such tickets, or either of them, and the license, liberties, and privileges aforesaid, at pleasure: And *Taylor* for himself, his heirs, executors, administrators, and assigns, covenanted with *Gourgas*, and his assigns, that if either of those tickets should be at any time sold, then the purchaser might, upon surrendering the tickets so purchased, have a new ticket, to be made in his own name, upon payment of one guinea. And further, for defending the rights and privileges of *Gourgas*, or his assigns, holders or owners of those six tickets, against all accidents by fire, or otherwise, whereby those tickets might be lost, &c. or rendered useless to the owners, that upon notice in writing to the treasurer at the office of the theatre, of any such loss, whereby the owners of the tickets might be deprived of the use thereof, and upon authority given to stop such loss or missing ticket at the doors of the theatre, and to refuse admission to the bearer, the real owner or proprietor for the time being should be entitled to one personal admission in respect of each such missing ticket, for one month; and in case such lost ticket should not be produced, or appear at the theatre within the month, such proprietor should be entitled to a new ticket, for the residue of the term thereby granted, with all the privileges and advantages that the lost or missing ticket gave, or were annexed, or intended by that indenture so to be, paying for the same one guinea, and surrendering all right and interest under such former ticket, and authorising the stopping and retaining the same, if thereafter it should be presented at the doors of the theatre: That on the 16th *July*, 1799, the Plaintiff became the purchaser from *Gourgas* of the ticket numbered 471, and the lawful bearer thereof, and entitled to be present at, and see all operas, exhibitions, and other public entertainments (the concert of ancient music excepted) there to be had during the residue of the respective terms of twenty-one years, or twenty-one seasons: That afterwards, on 1st *November*, 1810, the Plaintiff lost the same ticket, and thereupon, on 29th *December*, the Plaintiff, in pursuance of the indenture, duly obtained a new ticket in lieu of the lost ticket [and set out the description of it], whereby the Plaintiff became and thence hitherto had been entitled to all the privileges and advantages that the lost ticket gave or intended to give: That while the Plaintiff was possessed of that ticket, and so entitled, and during the

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term of twenty-one seasons, on the 17th *January*, 1815, and whilst public entertainments (not being the concert of ancient music) were performed in the said theatre, the Plaintiff attempted to enter the theatre at the proper door, and presented that ticket to the proper person in that behalf; and avers notice; yet that the Defendant, contriving to injure the Plaintiff, prevented him from entering the theatre, unless he would pay 10s. 6d., which he, thereupon, to obtain admission, paid. There were other counts stating the grievance more generally. The cause was tried at *Westminster*, at a sittings in *Hilary* term, 1816, before *Gibbs*, C. J., when it appeared that by indenture of 1st *August*, 1792, between *F. de Burgh*, *P. Goldsworthy*, *T. Hammersley*, and *W. Sheldon*, Esquires, 1.; *R. B. Sheridan*, and *T. Holloway* Esquires, 2.; and *W. Taylor*, 3.; Reciting four several demises of the theatre, and certain additional buildings, made by *Vanburgh* and others to Sir *Peter Denis* and *James Brooke*, the latest whereof was from 4th *July*, 1777, for twenty-one years, and that *Taylor* had by assignments become possessed of those leases and premises, and that in 1789 the theatre was burnt down; that *Taylor* rebuilt; that on 2d *February*, 1792, *Vanburgh* and Wife, and also *Sheridan* and *Holloway* (who by letters patent from the crown were entitled to the reversion of the premises on the termination of the then existing leases), assigned to *De Burgh*, *Goldsworthy*, and *Hammersley* the ground on which the new theatre was built; in trust, first, to pay the rent to the crown, next to pay *Vanburgh*, and, after his decease, his wife, if she survived, an annuity of 400*l.*, and to pay the residue then, and after the decease of *Vanburgh* and wife, the whole, of the profits to *Sheridan* and *Holloway* equally; that two terms granted to *Vanburgh* by the crown had become vested in *Sheridan* and *Holloway*, subject to the lease to *Brooke*, then vested in *Taylor*; that in consideration of *Taylor*'s expense in rebuilding, and the rent, covenants, &c., *Sheridan* and *Holloway*, and also *De Burgh*, *Goldsworthy*, *Hammersley*, and *Sheldon*, as trustees, at the request of *Taylor*, agreed to grant *Taylor* a new lease of the premises comprized in the lease to *Brooke*, and assigned to *F. de Burgh*, *Goldsworthy*, *Hammersley*, and *Sheldon*, in trust for *Sheridan* and *Holloway*, for a reversionary term of twenty-two years from *Michaelmas*, 1803, by that indenture, *De Burgh*, *Goldsworthy*, *Hammersley*, and *Sheldon*, at the request, &c. of *Sheridan* and *Holloway*, demised, and *Sheridan* and *Holloway*

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the *Drury Lane* company and theatre; that *Taylor* was to receive 1000*l.* *per annum* out of the rents, &c. to complete the theatre; that the debts of the *Pantheon* and *Hay-market* theatre were to be paid in rateable proportions out of the residue of the rents and profits of the Opera-House, by instalments of 4000*l.* a year; that 200*l.* a year was to be paid to *Witham*, as a trustee for persons then lately interested in the *Pantheon*, during *O'Reilly's* life, and that the remainder of the rents and profits was to be paid to *Taylor*; that to raise money to complete the theatre, and satisfy debts, *Taylor* was to be authorized to sell 41 boxes at 1000*l.* each, and that all silver tickets and claims of right of admission into the Opera-house, for which considerations had been given, should remain unimpeached: that a manager was to be appointed, with power to engage performers, and that the annual expenditure of the theatre was not to exceed 21,000*l.*; and that for carrying into execution this plan, the theatre was to be vested in *Sheldon*, *Benton* and *Needham* as trustees, for the residue of the terms granted by *Sheridan* and *Holloway*. Then by that indenture, in consideration of the premises, and of 10*s.*, *Taylor* granted and assigned to *Sheldon*, *Benton*, and *Needham*, the Opera-house, for the remainder of sundry terms now expired, and amongst others the beforementioned term of twenty-two years; upon trust to receive the rents, profits, subscription, door-money, and other the annual income, to pay thereout the taxes; then 300*l.* annual rent to *Holloway*, and 1260*l.* annual rent to *Sheridan* and *Holloway*, to *Harris* 250*l.* *per annum*, in respect of the patent to be annexed to *Drury Lane* theatre; then to pay performers' salaries, and servants' wages, &c. not exceeding 21,000*l.* then to pay *Gallini's* debt of 8500*l.* by instalments of 1500*l.* a-year, with interest; then to pay 1000*l.* a-year to *Taylor*, or the architect or other person he might employ for ten successive years to complete the theatre; then to pay *Witham* for the life of *O'Reilly* 200*l.* a-year, viz. 100*l.* for *O'Reilly*, and the other 100*l.* for his sister; then to pay 4000*l.* a-year, or such less surplus as there should be, one moiety thereof towards the discharge of *O'Reilly's* debts in respect of the *Pantheon*, and the other moiety towards the discharge of *Taylor's* debts in respect of the *Haymarket* theatre, and the surplus, if any, above that 4000*l.*, to *Taylor* for his own benefit. And the trustees were empowered to appoint a manager, removeable at pleasure; and the subscription-money and door-money was to

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be paid to a banker to the account of *Sheldon, Benton, and Needham*; and after the trusts were performed, the property was to be restored to *Taylor*. After the execution of this deed, *Taylor* continued in the absolute management of the theatre, and receipt of the profits, as before, and no possession was taken by the trustees till 1800, when *Sheldon* entered, and for a time assumed the possession, but after that time they again replaced the possession in *Taylor*. On the 19th *March*, 1799, *Wm. Taylor* by deed (reciting that he had been for some time past, and then was, the sole proprietor of the Opera-house, and of all benefit to arise thereby), granted to *Gourgas*, his executors, administrators, and assigns, six silver tickets of admission (among which was No. 471.), and gave and granted to the respective bearers thereof to be admitted *gratis* during the term of twenty-one years or twenty-one seasons, from 24th *June* 1797; to hold the same with such free license, &c. to *Gourgas*, his executors, administrators, and assigns, for the term of twenty-one years or twenty-one seasons, with full power to sell such tickets and license, &c. at pleasure. And *Taylor* covenanted, "that he had good right so to grant such tickets, and that he would warrant to the owners thereof the free enjoyment of such right for the term, and that if either of the tickets should be sold, the purchaser might, upon delivering up the purchased ticket, have a new ticket in his own name, on payment of one guinea, and further for preserving the right of *Gourgas* and his assigns, holders or owners of the ticket, against accidents whereby the same might be lost, upon notice to the treasurer of the theatre of such loss, the owner thereof should be entitled to another ticket for the residue of the term, in the same manner as he held the lost ticket, paying for the same one guinea. And upon every sale of the ticket, notice should be given to the office of the theatre, in order that the purchaser might be the better protected in the enjoyment of his right. On 16th *July*, 1799, the Plaintiff purchased by public auction the ticket numbered 471, which, upon payment of the price, was delivered to him, without deed. In 1809, the Plaintiff having lost his ticket, it was renewed to him in the manner stated in the declaration. He continued to enjoy a free admission to the theatre, from the time of his purchase, until *March*, 1814, when admittance was refused to him by the Defendant, who was a receiver, appointed by the Court of Chancery, by order of the trustees, *Sheldon, Benton, and Needham*,
 upon

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upon the ground that this was a grant which *Taylor* was not competent to make. For the Defendants it was contended, that *Taylor* having at the date of the deed of sale of the six tickets, no legal estate in the premises, that deed was void. For the Plaintiff it was urged, that the deed of 24th August, 1792, not being accompanied with possession was fraudulent, and *Reed v. Blades (a)* was cited, as having disposed of that trust deed: *Gibbs, C. J.*, held, that the Court had restricted that proposition to the personal effects only, which were therein comprised: he thought that the deed of 24th August, 1792, which, with relation to this question, was a conveyance of real property, was not void; he thought that the trustees were trustees to administer the funds, but that *Taylor* was to raise the funds, with power, perhaps, to the trustees to interpose, if they found *Taylor* misconducting the concern; and accordingly, in 1800, they did interpose for a time; but that previously to their interposition, the Defendant being left by these trustees, who had the legal title, in possession, with all these powers to manage the Opera-house, there was the strongest implication of an authority from the trustees to *Taylor* to issue these tickets; and under his Lordship's recommendation, the jury found a verdict for the Plaintiff for 29*l.* 8*s.*, being the damage sustained by two years' exclusion, at fourteen guineas *per annum*.

Best, Serjt., in the same term, obtained a rule *nisi* to set aside the verdict, and enter a nonsuit. In *Michaelmas* term, 1816, *Lens* and *Vaughan*, Serjts., showed cause, and *Best* endeavoured to support his rule. The Court took time to consider, and on this day the judgement of the Court, which involves the substance of the arguments on both sides, was delivered by

GIBBS, C. J. This was an action tried before me, at *Westminster*, against the door-keeper of the Opera-house, for denying admission to the Plaintiff, who was the holder of a silver ticket, purporting to give him entrance for twenty-one years. On the 1st August, 1792, the Opera-house, &c., was conveyed to *W. Taylor* for a long term now expired. *W. Taylor* had the complete management of the concern. On the 24th August, 1792, *W. Taylor* conveyed the said Opera-house, &c., to trustees, in trust to receive the profits and make certain payments. The trustees did not appear to have acted under this trust, un-

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(a) *Ante*, V. 212.

1817. *Taylor v. Waters.* till the year 1800. On the 19th *March*, 1799, *W. Taylor* granted by indenture six silver tickets of admission to one *Gourgas*, entitling the holder of each of them to free admission for twenty-one years. The Plaintiff became the holder of one of them, on and from the 16th *July*, 1799, and was never interrupted in his right of entrance till 1814, though the trustees had confessedly taken the management for some years, in and from 1800. In 1814, the door-keeper, by their direction, excluded the Plaintiff, for which exclusion the present action was brought. The objections to the Plaintiff's right were, 1. That *W. Taylor* had parted with the legal estate before he granted the silver tickets to *Gourgas*, and therefore nothing passed by that grant. To this it was answered, that the trustees, in whom the legal estate was vested, left the whole management to *W. Taylor*, without notice to any one of their claim, and therefore his acts in the course of that management were authorized by and binding upon them. The Defendant then insisted, 2. That this was an interest in land, and being for more than three years, could not pass without a writing signed by the party, or his agent, authorized in writing, and that *W. Taylor* was not so authorized by the trustees; and 3. it was further insisted by him, that such an interest could only pass by deed, and that *W. Taylor* could not be authorized by the trustees to execute such deed, except by a deed from them. The answer given to the two latter objections was, that this was not an interest in land, but a license irrevocable to permit the Plaintiff to enjoy certain privileges thereon, and was not required to be in writing by the statute of frauds, though it extended beyond the term of three years, and consequently might be granted without a deed; and although *W. Taylor* had affected to grant this by deed, it may bind the trustees, not as their deed, but as a license authorized by them. In support of this doctrine, the following cases are found: *Webb v. Paternoster* (a) license to the Plaintiff from Sir *W. Plummer* to lay a stack of hay on his land for a reasonable time; afterwards Sir *W. Plummer* leased the land, and the lessee turned in his cattle, and ate the hay, for which this action was brought. The Court held that such license was good, and could not be countermanded within a reasonable time, but that more than a reasonable time had elapsed, half a year, and therefore the license was at an end. This case was recognized

(a) *Falm.* 71. S. C. 2 *Ro. Rep.* 152. S. C. *Foph.* 151.

and acted upon by Lord *Ellenborough* and the Court of King's Bench, in *Winter v. Brookwell* (a). This shows that a beneficial license to be exercised upon land may be granted without deed, and cannot be countermanded, at least after it has been acted upon; and this would also be sufficient to show, that this is not such an interest in land as, by the statute of frauds, can only pass by writing; but if any doubt remained upon the latter point, it has been long ago expressly decided by the Court of King's Bench, in the case of *Ward v. Lake*, *Sayer* 3., better reported in a MS. book of Mr. Justice *Burrough*, p. 96. License to stack coals on the Defendant's close for seven years, cannot be revoked at the end of three. These cases abundantly prove, that a license to enjoy a beneficial privilege on land may be granted without deed, and, notwithstanding the statute of frauds, without writing. What the Plaintiff claims is a license of this description, and not an interest in the land. *Gourgas* paid a valuable consideration (225*l.*) to *W. Taylor* for these tickets, and the trustees might have called upon *W. Taylor* to account to them for that money. That it was in the ordinary course of management to make such grants, appears from the Plaintiff not having been disturbed by the trustees, while they had possession for some years, at least in and after 1800. He is therefore entitled to exercise the licence granted to him, and may maintain the present action against the Defendant who has disturbed him in it.

(a) 8 *East*, 308.

BIRD v. MORSE.

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Feb. 6.

FRERE, Serjt., moved, upon the usual affidavit, to change the venue from *London* to the county of the city of *Norwich*, that the Plaintiff might afterwards move for a writ of *venire facias*, directed to the sheriff of *Norfolk*, and that the cause might be tried by a jury of the county of *Norfolk*, the next adjoining county to the county of the city of *Norwich*, in pursuance of the statute 58 G. 3. c. 52., which gives either party this privilege.

The venue may be changed to a city on the usual affidavit, after which the party may, on motion, have a venire to the sheriff of the next adjoining county.

The Court took time to the following day to inquire into the practice, when, finding that the Court of King's Bench were,

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(as upon the motion was suggested by *Hullock*, Serjt., *amicus curiæ*) in the habit of granting similar applications, which were not remembered to have been before made in this Court, they
Granted the rule absolute.

Feb. 12.

HORSEFALL v. TESTAR.

A covenant to repair at all times, when, where, and as often as occasion should require during the term, and at furthest within three months after notice of want of reparation, is one covenant; and it cannot be stated as an absolute covenant to repair at all times when, where, and as often as occasion shall require during the term.

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IN covenant, the Plaintiff averred a demise, by *H. Penton*, by indenture to *J. Weston*, of a messuage to hold to him and his assigns for five years, and averred a covenant by the lessee, that he and his assigns would sufficiently repair, maintain, &c., and amend the messuage and premises, and all the walls, fences, &c. of, in, or belonging to the same, and that, from time to time, and at all times, when, where, and as often as need or occasion should be during the term; * and he showed a conveyance of the reversion to the Plaintiff, and an assignment of the term to the Defendant, and averred for breach, that during the demise, and after the conveyance of the reversion, and the assignment, the Defendant did not sufficiently repair and maintain the messuage, and all the walls of, in, and belonging to the same; but on the contrary, after the date of the lease, assignment to the Defendant, during the demise, and the Defendant's possession, and after the conveyance to the Plaintiff, the Defendant, without license, and against the Plaintiff's will, wrongfully pulled down and destroyed a certain part of one of the walls of the premises, and the materials thereof wrongfully carried away, and converted to his own use, and wrongfully erected a breast-timber in place of that part of the wall which was so injuriously broken down, and continued it hitherto so erected, whereby the messuage was weakened and damaged. Upon the trial of the cause, at the sittings in *Middlesex*, after *Michaelmas* term, 1816, before *Gibbs*, C. J., upon the plea of *non est factum*, the lease produced in evidence for the Plaintiff contained a covenant that "the lessee and his assigns would sufficiently repair, maintain, &c., and amend the messuage and premises, and all the walls, fences, &c., of, in, or belonging to the same, and that, from time to time, and at all times when, where, and as often as need or occasion should
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be during the term, and at furthest, within three months after notice of any decay or want of reparation should by the lessor, or his assigns, be given to, or left at the demised premises for the lessee or his assigns." *Gibbs, C. J.*, was of opinion that the latter clause so materially qualified the covenant, as to render it a wholly different covenant from that which the Plaintiff had alleged in his declaration, and that it was a fatal variance; and he directed a nonsuit.

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Lens, Serjt., in this term, obtained a rule *nisi* to set aside the nonsuit, and have a new trial, against which

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Best and Copley, Serjts., showed cause. Upon this covenant a plea that the Defendant repaired within three months would be good. If the whole covenant had been set out, it would be clear that the Plaintiff could not recover without averring and proving three months' notice, which was requisite as well in the case of voluntary waste committed by the assignee in pulling down a wall, as in the case of permissive decay.

Lens, Serjt., in support of his rule. These are two distinct covenants. There may be two distinct covenants in one sentence. Immediately on the premises going out of repair, there shall be an action on the breach: the Plaintiff may, at his option, either proceed on the general covenant, or on the further covenant to repair within three months after notice; but the Plaintiff is not bound to give the notice, and he may rely on the general covenant, if he will. And the nature of the breach is a material consideration. This is a non-repair of a particular sort, occasioned by the voluntary act of the Defendant. *Roc, on Demise of Goatley, v. Paine (a)*, is in point. The Defendant objected, that after notice to repair within three months, an ejectment for the forfeiture by not repairing could not be brought within the three months: Lord *Ellenborough* says, "The lease contains a general covenant to keep the premises in repair. By breach of this the lease was forfeited, and the notice was no waiver of the forfeiture." *Howell v. Richards (b)* is applicable. Whether the two covenants stand in the same, or in different sentences, the object of the contract must be looked to. The latter clause does not, according to the effect contended for, qualify, but annihilate the other. The more natural construction is, to give effect to each part. The lessee has no right to say that there is any time during which he may leave the premises in decay.

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(a) 2 *Campb.* 520.(b) 11 *East*, 635.

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Best, in reply. In *Goatley v. Paine*, there was a general covenant; and there was no discussion, whether there were one covenant or two, nor whether they were repugnant or not. The case of *Howell v. Richards* only shows, that where part of one covenant qualifies another covenant, the whole must be stated; but it is impossible that there should be two covenants in one sentence.

Cur. adv. vult.

DALLAS, J., on this day pronounced the judgement of the Court, that this nonsuit ought not to be set aside. An absolute covenant is not the same as a qualified covenant, if they differ in substance. This declaration states an absolute covenant. There is a difference in substance; namely, the giving of three months' time to put the premises in repair. And the whole stands in the same sentence; therefore it is unnecessary to inquire what the effect would be, if a separate covenant were found in a different part of the same deed. Separate and distinct covenants are those which severally make a complete sentence. This is one entire covenant, the whole of which must be taken together, and therefore the rule must be

Discharged.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

1817.

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

EASTER TERM,

In the Fifty-seventh Year of the Reign of GEORGE III.

MEMORANDA.

IN the *Hilary* vacation died, at *Bath*, the Right Honourable Sir *Alexander Thomson*, Knight, Lord Chief Baron of His Majesty's Court of *Exchequer*.

On the first day of this term, Sir *Richard Richards*, Knight, one of the Barons of His Majesty's Court of *Exchequer*, was appointed to the office of Lord Chief Baron of the same Court, vacant by the death of the Right Honourable Sir *Alexander Thomson*, Knight.

In the beginning of this term, Sir *William Garrow*, Knight, resigned the office of Attorney-General to His Majesty, and was called to the degree of the coif, and was appointed to the office of one of the Puisne Barons of His Majesty's Court of *Exchequer*, vacant by the promotion of Sir *Richard Richards*. He gave rings with the motto, *Fas et jura*.

In the same term, Sir *Samuel Shepherd*, Knight, late His Majesty's Solicitor-General, was appointed to the office of His Majesty's Attorney-General, vacant by the promotion of Sir *William Garrow*.

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And in the same term, *Robert Gifford*, Esquire, was appointed to the office of His Majesty's Solicitor-General, vacant by the
VOL. VII. D D promotion

1817. promotion of Sir *Samuel Shepherd*. He soon after received the honour of knighthood.
- MEMORANDUM.

April 23. JOHNSON and Others v. THE COKE AND GAS-LIGHT COMPANY.

Motions to regulate the trial must be made, not to the Court, but to the Judge who presides at *nisi prius*.

As, a motion to try a cause at a sittings in term, notwithstanding a special jury obtained by the opposite party for delay.

THIS was an action upon an award directing the Defendants to pay a sum of money by instalments, two of which being due, the Plaintiffs sued, and the Defendants pleaded *non est factum*: the cause was in course for trial on the first day of sittings in this term, when the Defendants obtained a rule for a special jury.

Blosset, Serjt., upon an affidavit that their purpose was believed to be delay, moved, on the authority of *Bloxham v. Brown* (a), that the cause might be tried by the special jury at the first sittings, for which it before stood.

The Court, upon reference to the case cited, directed the application to be made before the judge who was to preside at *nisi prius*: if the application had been, as the unsuccessful application to the Court in the case cited was an application to set aside a rule of the Court, then it was proper to make the motion in bank, but where it was a motion to regulate the trial, the party must apply to the judge who presides at *nisi prius*.

And they refused to make any order.

(a) *Ante*, IV. 470.

April 24.

DUNCAN, Gent. v. RICHMOND.

Where an attorney has in his custody muniments of two Co-defendants, the Court will not refer it to the prothonotary to ascertain which of them he shall deliver over to one Defendant, paying the debt and costs.

THIS was an action on an attorney's bill. *Bosanquet*, Serjt., moved to refer it to the prothonotary to inquire what deeds, papers, and writings ought to be delivered over by the Plaintiff to the Defendant on payment of debt and costs. The Plaintiff doubted whether he could safely deliver over certain deeds belonging to a Co-defendant.

GIBBS, C. J. Here are deeds delivered to the Plaintiff either by A. and B. jointly, or some by A. and some by B. The

The Plaintiff has a lien on some of these deeds for his bill. But some of the deeds belonging to *A.*, some to *B.*, and some jointly to *A.* and *B.*, we cannot bring *B.* before this Court to try his rights.

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Rule refused.

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April 24.

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THE Plaintiff declared that the Defendant had held and enjoyed divers messuages and two small rooms as tenant thereof to the Plaintiff, to wit, for the residue of a term ending 24th June, 1815, upon certain terms, viz. that the Defendant, during his tenancy, at his own costs, would from time to time, and at all times, when, where, and as often as need or occasion should be or require, well and sufficiently repair, uphold, maintain, amend, and keep the premises, and every part, in, by and with all and all manner of needful and necessary reparations and amendments, and the same so well upheld, &c., at the end, or other sooner determination of the term, which should first happen, would peaceably yield up to the Plaintiff in as good plight and condition as the same were in, when finished under the direction of Mr. *John Middleton*; but that the Defendant, not regarding his duty in that behalf, but contriving to injure the Plaintiff, whilst the same were in the Defendant's possession as tenant thereof to the Plaintiff, to wit, on the 24th June, 1810, and on divers other subsequent days before 24th June, 1815, wrongfully suffered the messuages and two small rooms to be, become, and continue, and the same during all that period, and still, were ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary reparations and amending, &c., and afterwards, on that day, the Defendant wrongfully yielded up to the Plaintiff the premises, so ruinous, and in much worse order and condition than *when the same were finished under the direction of *Middleton*. The Plaintiff in his second count stated that the Defendant had held divers messuages and two small rooms as tenant thereof to the Plaintiff, viz. upon certain terms, that the Defendant, during his tenancy, at his own costs, would from time to time, and at all times, when,

An action upon the case in the nature of waste cannot be supported against the assignee of a lease, in which the lessee had covenanted "from time to time, and at all times during the term when need should require, sufficiently to repair the premises, with all necessary reparations, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of *J. M.*," upon a breach that the Defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after he term wrongfully yielded them up in much worse order and condition than when the same were finished

under the direction of *J. M.*

Semble, that case will not lie against a lessee for years for permissive waste.

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where, and as often as need or occasion should be or require, well and sufficiently repair, uphold, maintain, amend, and keep the premises in, by, and with all and all manner of needful and necessary reparations and amendments; and assigned for breach that the Defendant, not regarding his duty, but wrongfully intending to injure the Plaintiff, whilst the same were in the Defendant's possession as tenant thereof to the Plaintiff, on 24th *June*, 1810, and other days, wrongfully permitted the messuages and two small rooms to be, become, and continue, and the same during all that period, and still, were ruinous, prostrate, fallen down, and in great decay for want of needful and necessary reparations, and amending, maintaining, repairing, and upholding the same. The Plaintiff in his third count averred that the Defendant held the premises as tenant to the Plaintiff, upon the terms that the Defendant should, whilst he so continued tenant, sufficiently repair, maintain, support, and keep them; and he averred that the Defendant was and continued his tenant thereof from 24th *June*, 1810, until 24th *June*, 1815; but that the Defendant, not regarding his duty, did not, nor would whilst he so continued tenant, sufficiently repair the premises, but had neglected so to do, and, on the contrary, during all that term, had suffered and permitted the premises to be and remain ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary reparations, maintaining and upholding the same. The Defendant pleaded the general issue.

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This cause was tried at the *Surrey* Lent assizes, 1817, before *Dallas*, J. It appeared that the Defendant had been tenant of the premises under a lease to *Rotton* for twenty-one years from 24th *June*, 1794, wherein the lessor covenanted that he would at his own costs cause the several alterations and improvements then going on under the direction of Mr. *John Middleton*, with respect to the basement, stories, and drains of the premises, to be completed before 24th *June* then next, and the lessee covenanted that he, his executors, administrators, and assigns, or some or one of them, would, at his, or some or one of their own costs, from time to time, and at all times during the term, when, where, and as often as need or occasion should be or require, well and sufficiently repair, uphold, maintain, amend, and keep the premises, and every part, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, and the same so well and sufficiently upheld, sustained, maintained,

maintained, repaired, paved, amended, and kept, at the end or other sooner determination of that demise which should first happen would peaceably yield up to the lessor, in as good plight and condition as the same should be in, when finished under the direction of Mr. *John Middleton*, agreeable to the lessor's covenant therein contained (reasonable use and wear excepted). For the Defendant it was objected, that an action upon the case could not be maintained for permissive waste, upon which ground *Dallas, J.*, directed a nonsuit, with liberty to move to set it aside, if the Court should be of opinion that the action were maintainable.

Vaughan, Serjt., now moved to set aside the nonsuit and have a new trial. The *dictum* of *Mansfield, C. J.*, in *Herne v. Bembow* (a); that case lies not, for permissive waste was merely *obiter*, and not the point in the case. By the statute of *Gloucester*, a tenant for years, as for half a year, or a year (b), is liable for waste; and that though he be assignee of the term (c). And he is liable as well for permissive as for commissive waste. And Lord *Coke*, in his reading on that statute, saith, he that suffereth a house to be out of repair is guilty of waste. So, "If the tenant suffer the houses to be wasted, and then fell down timber to repair the same, this is a double waste (d)." So, "If a tenant permit a chamber to be in decay for default of plaistering, whereby the great timber becomes rotten, and the chamber becomes very foul and filthy, an action of waste lies for it (e). So affirmed in error." So, "If a lessee permit the walls to be in decay for default of daubing, whereby the timber becomes rotten, an action of waste lies. *Newell v. Downing* (f)." And, "Between Sir *John Corbett*, and Sir *James Stonehouse* (g), admitted and adjudged, that an action of waste lies for permitting the walls of messuages to be in decay and unrepaired for default of daubing and plaistering, whereupon, 'no waste done,' was pleaded; and this also was admitted upon a writ of error thereon in B. R." And the cases where it has been held that an action on the case does not lie for permissive waste, must be intended of actions against tenants at will in the true and strict legal meaning of the word; not of actions against

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(a) *Ante*, IV. 764.(b) 3 *Inst.* 302.(c) *Ibid.*(d) *Co. Litt.* 53, b.(e) 2 *Ro. Abr.* 816., *Wast*, pl. 36.(f) 2 *Ro. Abr.* 816., *Wast*, pl. 37.(g) *Ibid.*

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tenants for years, or from year to year. The authorities that support this distinction are collected by the deep learning of the editor of *Saunders* (a). And that most able pleader *gives a precedent (b) of a declaration for the very action of case for permissive waste against a tenant for years, taking it to be acknowledged law, that the action for permissive waste will lie. In *Kenslyside v. Thornton* (c) it was held, that the contract does not deprive the lessor of his remedy for waste. And though in *Gibson v. Wells* (d) it is put broadly in the margin, that case lies not for permissive waste, yet the case does not support the proposition to the general extent, for there it is expressly stated, that the Defendant was merely tenant at will.

GIBBS, C. J. I do not say whether permissive waste may or may not lie, but it is impossible that it should be waste, to omit to put the premises into such repair as *A. B.* had put them into. Waste can only lie for that which would be waste if there were no stipulation respecting it; but if there were no stipulation, it could not be waste to leave the premises in a worse condition than *A. B.* had put them into. I think that is certainly not waste.

The rest of the Court concurred in

Refusing the Rule (e).

(a) 1 *Wms. Saund.* 323 a. n. 7., and 2 *Wms. Saund.* 252. n. 7.

(b) 2 *Wms. Saund.* 252. c. n. 7. (c) 2 *Bl. Rep.* 1111. (d) 1 *New Rep.* 290.

(e) The reporter did not collect whether the Court expressed any decided opinion on the 2d and 3d counts, on which the counsel did not much dilate, but which had no reference to the repairs done by *J. Middleton*.

April 28.

FRY v. HILL.

The holder of an inland bill, payable after sight, is not bound instantly to transmit the bill for acceptance.

THIS was an action for goods sold and delivered; and upon the trial before *Park, J.*, at the sittings after *Michaelmas* term, 1817, it appeared that the Defendant having occasion to pay the

He may put it into circulation, or

Though he do not circulate it, he may take a reasonable time to present it for acceptance.

What is a reasonable time is always a question to be determined by a jury.

A delay to present until the fourth day a bill on *London*, given within twenty miles thereof, is not unreasonable.

The vendor of goods being paid for them by a bill at one month after sight, given by the purchaser's banker for a larger sum than the price, the vendor paying the difference, is not, upon the bill's being dishonoured, precluded from recovering against the buyer the price of the goods.

Plaintiff

Plaintiff 134*l.* 18*s.*, for goods, early on *Friday* the 9th day of the month, the Defendant's bankers, on his account as to 134*l.* 18*s.*, (parcel) and receiving from the plaintiff the difference in cash, delivered at *Windsor* to the Plaintiff's servant, a bill to which the Defendant was no party, drawn by themselves upon their own corresponding banker in *London*, at one month after sight, for 140*l.* The bill was presented for acceptance on the 13th of the same month, and the country bankers having failed on that same day, acceptance was refused. *Shepherd*, Solicitor-General, contended, that as well by this course of dealing, which the Plaintiff himself had elected, as by his laches in presenting the bill, the Plaintiff had made the bill his own, and was paid for the goods. The jury, however, under the direction of *Park*, J., who relied on *Goupy v. Harden* (a), found a verdict for the Plaintiff.

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The *Solicitor-General* now moved to set it aside, and enter a nonsuit, renewing the same objections. He insisted that it was the duty of the Plaintiff, receiving a bill payable at a certain time after sight, to present it for acceptance as soon as he conveniently could: if the Plaintiff had forwarded this bill for acceptance on the *Friday*, *Saturday*, *Sunday*, or *Monday*, he would thereby have enabled the Defendant to withdraw his funds from his banker's hands. The necessity is more urgent to present for acceptance a bill payable after sight, than a bill payable after date, because by deferring it, the holder protracts the period of that payment, whereby the drawer proposes to withdraw his effects from the hands of the drawee. Secondly, it was for the Plaintiff's own convenience of remittance, that, instead of taking a check for the sum which the Defendant proposed to pay, he had commuted it for a bill; and this was strongly evinced by his taking a bill, not for 134*l.* 18*s.*, but for 140*l.*, paying the difference, and therein blending his own property with this payment, whereby he had rendered the bill completely his own, and was paid for his goods.

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GIBBS, C. J. The Defendant's argument on the first point would go to the extent, that the holder of a bill payable after sight is bound to transmit it for acceptance, without putting it into circulation at all. But even if it were a case in which it was required to give instant notice, it has been repeatedly determined, that the holder of a bill is not bound to send it on the same day that he receives it; and there was no post to *London* on the Sa-

(a) *Ante*, 159.

1817. *tuesday*. He might have sent it on the *Sunday*. But I do not go upon that ground. The holder must present a bill payable after sight within a reasonable time; but it is in the power of the holder to postpone the day of payment, by postponing the date of the presentment for acceptance; and he certainly may put the bill into circulation if he will. In the recent case of *Goupy v. Harden*, the bills were put into circulation; here it does not appear what was done with the bill in the interval. The question on these bills drawn at sight certainly is left very loose by the cases. The result of the cases undoubtedly is that which I have stated; and *Eyre, C. J.*, says, in *Muilman v. D'Eguino (a)*, that it is under all circumstances a question for the jury to determine, whether such a bill was presented in reasonable time. *Buller, J.*, in the same case, rather narrows that doctrine, and though he agrees, that if it were in circulation a twelvemonth, there would not be laches; but he says, that if, instead of putting it into circulation, the holder were to lock it up for any length of time, he would be guilty of laches. Is this, therefore, a case, in which the Plaintiff can be said to lock up this bill for any length of time? If we were to grant a new trial, the result would come at the last to this; it would be a question for the jury, whether there has been a default to present the bill within a reasonable time. That question has already been left to the jury, and they have found that the bill was presented in a reasonable time. We think, as the matter stands, it is perfectly right.

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FRY
v.
HILL.

Rule refused.

(a) 2 II. BL. 565.

April 28.

MATTHEWS and Another v. DICKINSON.

In an action for maliciously suing out a commission of bankrupt against the Plaintiffs, "surviving partners of Edmund Darby," as the fact was, an averment that the commission was superseded, is not proved by a writ of *supersedeas*, to supersede a commission against the Plaintiffs "surviving partners of Edward Darby."

THIS was an action brought for maliciously suing out a commission of bankrupt against the Plaintiffs, as the surviving partners of *Edmund Darby*, which in their declaration they averred to have been duly superseded. Upon the trial of the cause at the *Worcester* Spring assizes, 1817, before *Burrough, J.*, the Plaintiffs proved a commission issued against them as the

surviving

surviving partners of *Edmund Darby*, as in fact they were; and they proved an order of the Lord Chancellor for superseding the same commission; but the writ of *supersedeas*, issued thereon and produced, was to supersede a commission issued against the Plaintiffs as the surviving partners of *Edward Darby*. *Burroughs, J.*, held that this writ could not supersede that commission, and directed a nonsuit.

Best, Serjt., now moved to set aside the nonsuit and have a new trial. He urged that it was immaterial whether the name of the deceased partner were *Edmund* or *Edward*, the commission affecting only the survivors. The *supersedeas* would have been good, though it had omitted all mention of the deceased partner: it sufficed to name the living ones. There was evidence in the cause which proved that no other commission ever issued to which this writ could apply, and that the writ did apply to this commission. The commission was in substance superseded. It could not be doubted, that upon application made to the Court of Chancery to correct this misprision of the officer, if the Court had not thought it too frivolous for amendment, it would have been instantly corrected.

GIBBS, C. J. This was an action for maliciously suing out a commission of bankrupt. Unless it was superseded, the action could not be supported. The Plaintiffs declare against the Defendant for suing out a commission against the survivors of *Edmund*: the *supersedeas* is to supersede a commission against the survivors of *Edward*, and it is contended this is no variance. To what extent is this doctrine to go? It is said, that it is very hard that the party should suffer by the act of the officer; but wherever officers do err, the party does suffer. Suppose a judgement were obtained against *William Dickinson*, and the officer draws up a judgement against *Thomas Dickinson*, that judgement could not be supported. Therefore, though, no doubt, the error in this writ might be amended by the Court of Chancery, yet I cannot say that there was any legal proof that the commission has been superseded.

Rule refused.

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MATTHEWS
v.
DICKINSON.

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1817.

April 28.

WOGAN v. SOMERVILLE.

The house-apothecary of an infirmary, who officiates in mixing medicines for the patients of the charity, but for no others, is a person already in practice as an apothecary, within s. 14. of the apothecary's act, and needs not obtain a certificate, nor serve an apprenticeship of five years, as required by the 15th section of the statute.
55 G. 3. c. 194.

[402]

IN an action for a libel, the Plaintiff declared, that he had been, and was an apothecary, and had exercised, and still continued to exercise the calling and business of an apothecary, and averred a libel published concerning him as such apothecary. Upon the trial of the cause at the *Stafford* Lent assizes, 1817, before *Park, J.*, the Plaintiff did not produce any such certificate of his qualification to practise as an apothecary, as the statute (a) directs apothecaries to obtain, but he proved that, being articulated as an apprentice to an apothecary for five years and a half, till he was 21, he had served him for three years and a half, at the end of which time, being about four years before this action, upon his master quitting his practice, the trustees of the *Stafford* infirmary appointed the Plaintiff their house-apothecary, in which situation he had, for four years, officiated in mixing medicines for the patients of that charity, but for no others. For the Defendant, it was objected, that this evidence did not prove the allegation that he was an apothecary; because the statute (a) directs that "it shall not be lawful for any person or persons (except persons already in practice as such) to practise as an apothecary in any part of *England* or *Wales*, unless he or they shall have been examined by the Court of Examiners, or the major part of them, and have received a certificate of his or their being duly qualified to practise as such, from the Court of Examiners, or the major part of them;" it was therefore necessary, that the Plaintiff should prove the fact of his being an apothecary, by the production of his certificate, which he not only had not produced, but, upon the evidence, it appeared, that it was impossible he should obtain a certificate, because the 15th section provided, "that no person should be admitted to any such examination for a certificate to practise as an apothecary, unless he should have served an apprenticeship of not less than five years to an apothecary," whereas the Plaintiff had served an apprenticeship of three years and a half only; and, by s. 20., he could not under these circumstances practise as an apothecary, without subjecting himself to a penalty of 20*l.* *Park, J.*, was of opinion that

(a) 55 Geo. 3. c. 194. s. 14.

the Plaintiff came within the exception in the 14th section, as a person already in practice as an apothecary, but he reserved the point, subject whereto the jury found a verdict for the Plaintiff.

Shepherd, Solicitor-General, now moved to set aside the verdict and enter a nonsuit, upon the objection that the Plaintiff had not proved himself to be an apothecary.

GIBBS, C. J. I am quite clear that a person who had four years since been admitted to officiate as apothecary to that infirmary, comes within the proviso of the act, as a person already inpractice, for whom it is not necessary to obtain any other diploma.

Rule refused.

1817.

WOGAN
v,
SOMERVILLE.

WELLS and Another, Assignees of FISHER v. ROSS.

[403]

April 28.

THIS was an action for the price of goods of *Fisher*, a bankrupt sold and delivered, for money had and received, and upon the other money counts. The Defendant pleaded in abatement, that there was another joint contractor who was not sued, and issue was joined upon that plea. At the trial of the cause at *Guildhall*, at the sittings after *Hilary* term, 1816, before *Park, J.*, the Plaintiffs proved that *Fisher* had sent out certain shooks of pipe-staves to the *Cape of Good Hope*; to the Defendant and *Twycross*, who were then partners. They contended that the goods were sold outright, but the evidence established only a consignment for sale on commission. They were in the habit of making him returns in wines. The Defendant and *Twycross* dissolved partnership, on which occasion the Defendant wrote to the Plaintiff, that "as *Twycross* declined joining the Defendant in shipping any more wines for the Plaintiff, he, the Defendant, would take out the remainder of the Plaintiff's shooks, and when a favourable opportunity offered, he would ship for the Plaintiff." The Plaintiff made no answer to this proposition, but the Defendant assumed the charge of the staves, and sold them. The jury found a verdict for the Plaintiffs, for money had and received, which

Goods were consigned to two for sale by commission; upon a dissolution of partnership the commission to sell was assumed by one: Held that he, having sold, was rightly sued for money had and received, which action could not have been maintained against both although, an action for not accounting would have lain against both.

Best, Serjt., now moved to set aside, contending that, upon the evidence, the bankrupt had never assented to the Defendant's sole commission; and the issue on the plea in abatement ought to have been found for the Defendant: further there was no evidence

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WELLS
v.
ROSS.

evidence that any money had ever come unto the Defendant's hands for these goods.

GIBBS, C. J. *Fisher*, who is now a bankrupt, consigns goods to *Ross* and *Twycross* abroad. They do not purchase the goods, but they accept the commission: neither of them was, in that state of the transaction, liable to an action for money had and received. They dissolved partnership, and then the Defendant takes on himself that which remains to be done, he sells the goods; and it must be taken that he sells them for money; and that the Defendant has received it; and he is alone liable in this form of action, for *Twycross* never received any part of the price. There was one form of action, namely upon their joint undertaking to sell on commission, in which the Plaintiff might have sued both, but in this form of action there is no ground at all to charge *Twycross*.

DALLAS, J. This was money had and received by the Defendant only.

PARK, J. The jury had the letters of the parties before them, and said, clearly this is only a consignment; and after the letters had been in *England* nine months, it is monstrous to say that *Fisher*, the bankrupt, had not assented to the proposal that the Defendant should take the commission on himself.

Rule refused.

[405]

April 29.

BUTTON v. CORDER.

Declaration on a warranty that seed was good, "which the Defendant could warrant," held sufficient after verdict.

THE Plaintiff declared on a warranty by the Defendant, that certain seed was good white round turnip seed, which he the defendant could warrant. After verdict for the Plaintiff, at the *Surrey* spring assizes, before *Bosanquet*, Serjt., *Onslow*, Serjt., moved to arrest the judgement, upon an objection that this was not equivalent to an allegation that the Defendant did warrant, or would warrant.

But *The Court* held the declaration sufficient, and refused to grant a rule.

1817.

ARMSTRONG and Another, Assignees of MASS and WHITE,
Bankrupts, v. STRATTON.

April 29.

[*406]

THE Defendant had been held to bail upon an affidavit of the clerk to the Plaintiffs' attornies, that the action was brought to recover of the Defendant the * sum of 369*l.* 9*s.* 6*d.* with interest, by virtue of a bond dated 12th *February*, 1816, entered into by the Defendant, as surety for *T. Faulding*, to the bankrupts, in the penal sum of 5000*l.*, conditioned for performance of an award to be made in manner therein mentioned, touching certain matters in difference between the bankrupts and *Faulding*; and that an award under the hands and seals of the arbitrators to whom those matters were referred was made on 9th *May*, 1816, pursuant to the condition in the bond, by which they directed *T. Faulding* to pay to the bankrupts, their executors or administrators, on demand, 369*l.* 9*s.* 6*d.*; that the Plaintiffs had been appointed assignees of the estate of the bankrupts under a commission, and that *T. Winckfeld*, one of the assignees, did on 17th *April* personally demand that sum under the award; but that *T. Faulding* did not then, nor had he or any other person since paid that sum or any part thereof, as the deponent believed, and that no tender to pay the money or any part had been made in notes of the Bank of *England*. *Copley*, Serjt., on a former day moved for a rule *nisi* to discharge the Defendant out of custody, on the defects in this affidavit. The bond was conditioned for performance of the award by *T. Faulding*: and the award was for payment of a sum on demand; but first, the condition of the bond was not set forth, which it ought to be; nor secondly, was it stated that any demand had been made on the principal: another objection was, that although it was sworn that no part had been offered in notes of the Bank of *England*, the affidavit did not, as it ought, say that no tender had been made either to the assignees or to the bankrupt. There was, indeed, a statute for curing informalities in that part of the affidavit which disaffirms a tender in bank-notes, but its operation was confined to mere informalities.

An affidavit to hold to bail, denying a tender in bank notes, is sufficient, though it do not say, no tender has been made to the parties, viz. where a bankruptcy has intervened, to the bankrupt and his assignees.

A discretion exists in this Court to receive supplemental affidavits to hold to bail.

By *Gibbs*, C. J. But it ought to be very sparingly exercised.

The court of King's Bench exercises no such direction. By *Park*, J.

An affidavit to hold to bail, stated that the action was brought by assignees of *T. F.*, a bankrupt, to recover 369*l.*, by virtue of a bond entered into by the Defendant, as surety for *T. F.* in 5000*l.*, conditioned for performance of an award touching matters between *T. F.* and *M.*; that an award was made pursuant to the condition, directing *T. F.*

to pay *M.* on demand 369*l.*; that a personal demand had been made, but that *T. F.* did not then pay, nor had he, or any other person since paid, and that no tender had been made in bank-notes. Held that this affidavit was insufficient, as it showed no cause of action. But held, that the denial of all tender in bank-notes, was good, without expressing in particular, that none was made to the Plaintiff or the bankrupt.

GIBBS,

1817. **GIBBS, C. J.** This is no more than a defect in point of form, for the affidavit denies any offer whatever, and that which is general comprehends within it every particular.

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STRATTON.

BURROUGH, J. It never has been usual to swear that a tender has not been made to the Plaintiff; it is sufficient to swear that no tender has been made: the word in the statute (a) is defect.

Upon the two first points, *The Court* granted a rule nisi.

Best, Serjt., now showed cause against this rule. The affidavit is sufficient. *Jenkins v. Law* (b) is something like it. He offered an affidavit, which he said would not militate with the rule of not receiving supplemental affidavits in these cases, because it suggested no new facts, but only explained all ambiguities with respect to the facts which this application supposed requisite, and therefore it might be consistently received; and inasmuch as the deponent had taken on himself positively to swear that the Defendant was indebted by virtue of the bond, the Court would give him credit that he swears the truth.

Copley, Serjt., in support of his rule. In almost every case a supplemental affidavit may be made consistently with the original affidavit, but in every such case it is refused. No affidavit is allowed to be made use of by the Defendant, and therefore, the Plaintiff's affidavit must be full and sufficient. In this case, a demand on the third person was absolutely necessary. It is not like the ordinary case.

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GIBBS, C. J. (stopping him). With respect to this affidavit as it now stands, it is, no doubt, defective. It is not enough to state that a Defendant is indebted on a bond; and, especially, when that bond is conditioned for the performance of an award. With respect to our receiving the explanatory affidavit of the Plaintiff, there is great weight in what my Brother *Copley* urges, and especially when it comes out of the mouth of one of the most experienced judges who ever sat in this Court, I mean Mr. Justice *Heath*: he was of opinion, seeing that the arrest is made solely on the affidavit of the Plaintiff, without any interference of the Defendant, that the discretion to permit a Plaintiff to file a supplemental affidavit ought to be very very sparingly exercised. Otherwise it would lead to the practice of arresting on very loose and insufficient affidavits. In the present case the defect in the affidavit is palpable: it shows no cause of action.

DALLAS, J., was of the same opinion.

(a) 43 G. 3. c. 18 s. 2. See *ante*, VII.

(b) 1 Bos. & Pull, 365.

PARK, J. The ground on which the Plaintiffs' counsel argues, would apply nearly to all cases. The discretion which exists in this Court, and which had better not exist (as the rule is in the court from which I came), ought very sparingly to be exercised.

Rule discharged.

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ARMSTRONG
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STRATTON.

PATTEN and Another, Assignees of GOULD, a Bankrupt, v.
BROWNE.

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April 29.

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THIS was an action of trover against the sheriff of *Dorset*, for the goods of *Gould*, taken in execution; and upon the trial of the cause, at the *Dorchester* spring assizes, 1817, before *Abbott*, J., the trading of *Gould* being disputed, the evidence to support it was, that *Gould*, who rented a considerable farm, but had a homestead at some distance, whereon he resided, bought several quantities of pigs, to the amount of fifty or three-score in a year, and sold them to any person who wanted them: he bred pigs at home, but not on the farm: the pigs which he bought were brought upon the farm, and kept there: he kept some a week, some more: he fed them upon the stubbles, and he then sold them: he also purchased 200 bushels of ray-grass-seed, for the purpose of re-selling it at a profit, and he re-sold it, but it was mixed with other seed which he had himself raised, and which was improved by the admixture.

Pell, Serjt., cited *Newland v. Bell* (a), to show that this was a trading, where *Gibbs*, C. J., directed the jury, "that if the bankrupt bought pigs with a view of profit from a re-sale, he was within the bankrupt laws." The jury first specially found that *Gould* sought a profit by his pigs; whereupon *Abbot*, J., directed them, that the *description of a trader was, a man who gets his living by buying and selling: a man might be a farmer and a trader also: he might be both a farmer, and a trader by dealing in pigs: it was clear that *Gould* was a farmer, and bred pigs, which were not the subject of the present consideration; and though he bought pigs, it was observable that the pigs which he bought on the stubbles, and resold them, some after a week, some after longer periods: Held these was an act of trading.

A person who buys any article for the purpose of mixing it with his own produce, with a view to sell the mixture more advantageously than his own produce could be sold unmixed, does not thereby become a trader.

A person who buys pigs or other stock with a view to a re-sale of them, as ancillary to the profitable occupation of his farm, and in the interval feeds them wholly or principally on the produce of his farm, does not thereby become a trader.

A farmer bought rye-grass-seed, mixed it with seed of his own growth, and sold the mixture. He bought pigs, put them on his farm, fed them that neither of

(a) 1 *Holt*, 221.

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were brought upon his farm; and the jury would consider, whether these purchases were ancillary to the profitable expenditure of the produce of his farm, or whether the direct object of them was a profit upon the re-sale of the pigs. Whereupon the jury found that this was not a trading.

Pell now moved, upon the authority of *Newland v. Bell*, to set aside this verdict, and have a new trial: he did not much rely on the dealing in the grass-seeds.

GIBBS, C. J. I am of opinion that the law was left to the jury most correctly by my Brother *Abott*. Withrespect to the seed, I hold, that a farmer, like a person of any other description, may buy seed, or any other thing, to mix with seed or other article of his own raising, with a view to sell the mixture more advantageously, and that if this operation be not used as a colour, this would not make him a trader. As to the pigs, the jury first find, as it was natural that a jury in their station of life would do, that he bought them to make a profit; but so every farmer buys every article with a view of making a profit; but the question is, whether he bought them with a view to making a profit as a trader, independently of the occupation of his farm. A man may buy pigs, or any other stock, for the purpose of selling them again; but if in the interval he principally, though not wholly, feeds them on the produce of his farm, that does not make him a trader. When the case is afterwards more fully explained to the jury, and they understand what the question is, they find that *Gould* was not a trader. In this case, not only does the law appear to have been most correctly left to the jury by the learned Judge, but it appears that the jury have found a perfectly right verdict.

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DALLAS and PARK, Js., concurred in opinion.

BURROUGH, J. In many years, the most profitable mode of using the produce of the farm, is to stock the land with pigs. In such a year, for instance, as last year, when so much wheat was beaten down by rain and tempest, it is the best practice that can be pursued, and must have been done in such a year, in thousands of instances; but that would not convert all the farmers into traders.

Rule refused.

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ALEXANDER EVELYN, and FRANCES his Wife, v. RADDISH
and Others.

April 30.

[*412]

IN covenant the Plaintiffs declared on a lease granted by *William Glanville*, being seised in fee, on 17th June, 1765, whereby the lessor demised to *T. Huddle*, his *executors, administrators, and assigns, four messuages situate in *Rathbone Place*, in the parish of *St. Mary-la-bonne*, to hold to *Huddle*, his executors, administrators, and assigns, for the term of 99 years, at a rent therefore payable; and the Plaintiffs averred that *Huddle*, amongst other things, for himself, his executors, administrators, and assigns, covenanted with *Glanville*, his heirs, and assigns, that he *Huddle*, his executors, administrators, or assigns, would at their own costs, within the first two years of the term, put the premises in good and sufficient repair, and from time to time, and at all times during the remainder of the term, well and sufficiently repair, uphold, support, maintain, amend, pave, cleanse, scour, empty, and keep the messuages, ground, and other the premises, when, where, and so often as need or occasion should be or require, and the same so in all things well and sufficiently repaired, supported, upheld, maintained, amended, and kept, at the end of the term, or other sooner determination of the lease, which should first happen, would peaceably and quietly leave, surrender, and deliver up to *Glanville*, his heirs or assigns: and further, that he, *Huddle*, his executors, administrators, or assigns, or some or one of them, would at his, or their, or some one of their own costs, within the first 50 years of the term, take down the four messuages, as occasion might require, and in the place thereof erect with good and substantial materials, and in a workmanlike manner, upon the premises thereby demised, not less than four other good and substantial brick messuages in the same uniform and † manner as the other messuages in *Rathbone Place* were then built, or should thereafter be erected and built; and they aver *Huddle's* entry and possession, and

A lessee covenanted, within the two first years of the term to put the premises in good and sufficient repair, and, at all times during the term, to repair, pave, scour, cleanse, empty, and keep the messuages, ground, and other the premises, when, where, and as often as need should require; and within the first fifty years of the term, to take down the four demised messuages; as occasion might require, and in the place thereof erect upon the demised premises four other good and substantial brick messuages. Breach. That although fifty years of the term had expired, the lessee did not, within the fifty years, take down the four messuages, and in the place thereof erect four other good substantial brick messuages. Plea. That occasion did not require. The Court intimated an opinion, that if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the covenant would be satisfied, without taking down the old houses.

within the fifty years, that the four messuages should be taken down. Upon demurrer, The Court intimated an opinion, that if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the covenant would be satisfied, without taking down the old houses.

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1817. show a devise of the reversion by the lessor to **William Evelyn* in tail, with remainder over, and the devisor's death, the seisin of *William Evelyn*, and a recovery suffered by him to the use of himself in fee; and a conveyance by lease and release, by *William Evelyn* to the Duke of *Beaufort* and Sir *Abraham Hume*, to the use of *William Evelyn* and his heirs for the life of the Plaintiff *Alexander Evelyn*, and a devise by *William Evelyn* of the reversion to the Duke of *Beaufort* and Sir *Abraham Hume*, to the use of the Plaintiff *Frances* for life; and the last devisor's death, and the seisin of the Plaintiffs for the life of the Plaintiff *Frances*, determinable on the decease of the Plaintiff *Alexander*; and they aver that the interest of *Huddle*, in 1812, came by assignment to the Defendants; and aver for breach, that although 50 years of the term did after the assignment to the Defendants, to wit, on 24th *June*, 1813, expire and determine, yet neither *Huddle*, nor the Defendants, or any or either of them, nor any other person, did or would at his or their own costs, or in any other manner whatsoever, within the first 50 years of the term, take down the four messuages, and in the place thereof erect with good and substantial materials, and in a workmanlike manner, or in any other way whatsoever, upon the premises, four other good and substantial brick messuages, in the same uniform and manner as the other messuages in *Rathbone Place* were, at the time of making the lease, or at any time after, erected and built; but that *Huddle* and the Defendants had respectively hitherto neglected so to do, contrary to the last covenant. The Defendant pleaded, first, that the lease was not the deed of *Huddle*; 2dly, performance; 3dly, that though true it was, that 50 years of the term did after the assignment to the Defendants expire and determine, yet that occasion did not require, nor was it at all necessary, at any time within the first 50 years of the term, that the four messuages should be taken down, and in the place thereof four other messuages be erected as in the lease was provided; 4thly, breach, that although true it was that 50 years of the term did after the assignment expire and determine, yet that occasion did not require, nor was it in any manner necessary, at any time after the assignment, within the first 50 years of the term, that the four messuages should be taken down, as in the lease was provided. The Plaintiffs demurred to the fourth and last pleas, and the Defendants joined in demurrer.

Lens,

Lens, Serjt., in support of the demurrer, stated, that the question was, whether it were left to the option of the lessee whether the lessee should take down the houses and rebuild them, or whether the lessee were not bound at all events, before the end of the 50 years, to take down and rebuild. This depended on the construction of the words "as occasion may require". The lessee contended that they meant, "if occasion shall require;" the lessor contended that it was agreed by the lease that there would be occasion within the 50 years, but that the lease contemplated that the occasion might occur sooner or later, within that period; and it was at the lessee's option when he would seize the occasion, but it must at all events be done within the fifty years. The general covenant to repair, applied not to the mere erections of the four messuages, but it was to empty, &c., applying to every part of the premises. It would apply to the new houses when built, as well as to the old ones. The lessor, he contended, was entitled to have the houses, at some time or other of the first 50 years of the term, wholly rebuilt from the ground, however good they might be, as repaired houses.

GIBBS, C. J. It is clear that the lessor is entitled to have four houses as good as new, before or at the end of fifty years, so that during the residue of the term, there will be only the wear and tear upon houses of that recent date. I go along with the Plaintiff thus much in the course of his argument, that he is entitled to new houses, in the course of the fifty years; but the question is, in what form he is to have them. If he has the original houses as good as new in the course of the fifty years, or perhaps better, for considering how houses are now built, a repaired house may be much better than a new one, I think the Plaintiff has all he is entitled to, and that he ought therefore to take issue on the question, whether there was occasion to rebuild, and if there were a house to all intents and purposes as good as new, I think the issue would be in favour of the Defendant. The lessee was to put the premises into complete repair within two years: he might have pulled down the houses and rebuilt them within two years, and that would have satisfied both covenants, and the lessor would at the end of the term have had houses with ninety-seven years' wear on them. If they were at any one part of the term as good as new houses, and to all intents as able to stand the wear and tear of the term as new houses, I think the covenant would be satisfied. The awkwardness lies in the words "as occasion shall require;" for thereon

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it must be shown that the occasion did arise: all this would be obviated, if the Plaintiff should take issue on the question. I should certainly direct a jury upon the trial of that issue, that unless the repaired house were completely and substantially to every purpose as good as a new house, at some time within the term, the issue must be found for the Plaintiff.

Lens availed himself of the permission of the Court, to withdraw the demurrer, and plead to issue.

Copley, Serjt., for the Defendants.

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FAIRLIE and Others v. CHRISTIE.

April 30.

If the assured, after subscription by the underwriter, strikes out with a pen the time of warranty of sailing, which stood in the body of the policy, and inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, the assured thereby destroys the policy, and the underwriter is discharged from the original contract.

THE Plaintiffs declared in their first count on a policy of insurance, effected on 27th Sept., 1814, at and from *Java* to *London*, upon ship or ships, sailing before 31st Dec., 1814, declared to be on goods, coffee in bags or bulk; and that by a memorandum dated 1st Dec., 1814, 8000*l.* out of 30,000*l.*, covered by that and another policy of even date, was declared to be on coffee, shipped in the *Good Hope*; and by another memorandum of 13th Dec., it was declared that the foregoing declaration was on 3070 punts of coffee, and 20 tubs of camphor valued at 8000*l.*; and that 9000*l.* more was to be on coffee by the *Starling*; and by another memorandum of 14th Feb., 1815, it was declared that 17,000*l.* of the insurance of 30,000*l.* being already declared, the remainder was as follows: 9000*l.* on goods by the *Star*, valued at that sum, and 4000*l.* on goods by the *Clarendon*, valued at 11,000*l.* (7000*l.* being insured by another policy on that ship); and the Plaintiff averred, that coffee of the value of 9000*l.* was, on 8th Oct., 1814, shipped in *Java* by the *Starling*; that she on 31st Dec., 1814, sailed, and was lost by perils of the seas; that on 23d Nov. goods value 9000*l.* were shipped in *Java*, on the *Star*: that she sailed on 23d Nov., and was captured; that goods of the value of 4000*l.*, were on 23d Nov. shipped in *Java*, by the *Clarendon*; that she sailed on 31st Dec., and was captured. In the second count, the Plaintiffs stated the policy to contain a warranty to sail on or before the 10th day of Oct., and averred all the other facts as in the first count. The Defendant paid the premiums into Court upon the count for money had and received. Upon

the trial of this cause at *Guildhall*, at the *sittings after *Trinity* term, 1816, before *Gibbs*, C. J., it was proved, that on the 27th *Sept.*, 1814, when the Defendant executed the policy, there was in the body of it a warranty to sail on or before the 10th of *Oct.*, as declared on in the second count. Upon the policy were indorsed on 1st *Dec.*, 13th *Dec.*, 1814, and 14th *Feb.*, 1815, respectively, the three memoranda of those dates: they were signed by the Defendant's agent. Before the time when either of these memoranda were so subscribed, the Plaintiffs, intending to apply for the assent of the underwriters, had written in the margin of the policy, opposite to the clause of warranty of sailing before the 10th of *Oct.*, the words "on or before the 31st *Dec.*, 1814," and had struck a pen through the date in the body of the policy, 10th *Oct.* Several underwriters had subscribed the initial letters of their names to the alteration of warranty in the margin, but the Defendant had not subscribed to it. It appeared that the *Starling* with her cargo, sailed on the 9th of *Oct.*, 1814, the *Star* on the 4th, and the *Clarendon* on the 25th of *Nov.* It was attempted to be established for the Plaintiffs, that the Defendant's agent had seen the alteration of the warranty of sailing before he signed the other memoranda, and had, therefore, in signing them, virtually assented to it; but it appeared that the Defendant's agent only looked at the memoranda on the back of the policy, whereas the alteration of the warranty was on the face of it, and his attention was not called thereto by the Plaintiff's broker. It was contended that, at all events, if he was not entitled to recover a loss on each of the ships, he was at least entitled to recover the loss on the *Starling*, which sailed within the time destined by the original warranty; in answer whereto it was urged by the Defendant, that the Plaintiff, by altering the policy without the Defendant's assent, in so material a part as the warranty of sailing, had altogether vacated the contract. The jury found that the Defendant had not assented to the alteration, but gave a verdict for the Plaintiff for the loss upon the *Starling*, with liberty for the Defendant to move to enter a nonsuit, if the Court should think that the policy was destroyed by the alteration.

Best, Serjt., in *Michaelmas* term, 1816, had obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Shepherd, Solicitor-General, now showed cause. He insisted that the Plaintiff was entitled to recover his loss on the ship *Starling*, which sailed before the time when, by the original policy,

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policy, it was warranted she should sail. A policy of insurance is a contract between the assured and each of the underwriters individually, and the contract may, as to certain of its stipulations, *e. g.* the time of sailing, be altered as to one underwriter, and not altered as to another. And in like manner, a contract might by the same policy originally be made with *A*, that the ship shall sail on one day, and with *B*, that she shall sail on another day. It is clearly not a joint contract; if it were, the alteration by a part of the underwriters could not bind them, but it must be either good as to all, or bad as to all. If a part of the underwriters agree by a memorandum indorsed on the policy to alter the time when the ship is to sail, not touching the face of the policy, it is clear that the underwriters on the face of the policy, would not be thereby discharged. It therefore must be contended by the Defendant, that the striking out the words with a pen wholly destroys the policy. But this proposition is disaffirmed by *Henfree v. Bromley (a)*, in which the Court held, that an instrument altered by the maker in the most material part, though not obligatory in its altered state, may still continue good in the state in which it originally stood. An arbitrator made an award for 57*l.*: he was then *functus officio*. Afterwards, thinking that sum wrong, he struck his pen through it, and substituted 66*l.*, and the award was held good for the original sum. In *Hill v. Patten (b)*, the alteration was in the subject-matter of the insurance. Unless it can be established that the change of the day of sailing requires a new stamp, that case will not apply. In the case of *French v. Patten (c)*, the Plaintiff had declared on the original contract, and the Defendant had signed the new contract, and so both parties had abandoned the old one. In the case of *Langhorn v. Cologan (d)*, cited at the trial, an entirely new subject of insurance was inserted, which had never been presented to the underwriter, and it was introduced into the very body of the policy. If there had been an actual erasure of the day in the body of this policy, and on the erasure an insertion of a new date of sailing, the case would be different, but this alteration leaves the contract in its original state. If the memorandum written on the margin had been signed by no underwriter, clearly that would not have destroyed the contract; if two had signed, that would not have discharged the contract as to the rest. This was not

(a) 6 *East*, 309.

(b) 8 *East*, 373.

(c) 1 *Campb.* 72.

(d) *Ante*, 1*v.* 320.

an alteration of the subject-matter of insurance, nor required a new stamp, still less could the old contract require a new stamp.

Best, who would have supported his rule, was stopped by the Court.

GIBBS, C. J. I allow great weight to many of the arguments urged on behalf of the Plaintiff. I admit, that in point of fact the distinctions stated do exist between this case and the cases which the counsel for the Plaintiff expected would be urged against him. In the two cases in the Court of King's Bench, *Hill v. Patten* and *French v. Patten* the Plaintiff and the Defendant had both agreed to the alteration; and the ground on which the first trial in the latter case proceeded, was, that the altered policy was a new instrument and required a new stamp: the Plaintiff then proceeded on the old instrument, and the Court held that it was destroyed by the alteration. There was a material distinction, inasmuch as that alteration was made by the assent of both parties. Here the assured having the policy, containing a warranty to sail on or before the 10th of *October*, intends to get the time enlarged: he knows he cannot get the time enlarged without the assent of the underwriters: he proposes to them to alter it to the 31st *December*, and strikes out the date of 10th *October*. See now in what a situation he leaves those underwriters who do not agree to that alteration! For by the striking out of this date he leaves them without any evidence of any warranty of the time of sailing, or restriction as to the time when the ship will sail: this is so material an alteration, that it avoids the policy altogether. I do not know that the Plaintiff did not mean to avoid the instrument as to all the underwriters: he might be confident that all would agree to the alteration, and he might intend, if any underwriters did not agree thereto, to effect a new policy to cover that interest so left uncovered. I therefore think it clear, that as to those underwriters who did not assent to this alteration, this policy is destroyed.

DALLAS, J. There is a material difference between an alteration of a deed with the assent of the party, and an alteration by the act of a stranger. If the warranty of the time of sailing be struck out altogether, it becomes an absolute contract without any qualification; therefore this is a material alteration in a material part of the contract, made by a party to the instrument; and it therefore avoids the contract.

PARK, J. I am of the same opinion. In the Court of King's Bench the two cases proceeded on the contract; this does not.

It

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It is an alteration in a material part, made by a party, and the policy is void.

BURROUGH, J. I have no doubt on this point, nor ever had from the beginning: it is clear that the alteration is made in a material part; it is clear that it is made by the party himself; and therefore it avoids the instrument.

Rule absolute for a nonsuit.

April 30.

JONES and MATTHEWS v. HERBERT.

Upon a very strong case of fraud, not otherwise, this Court will control the legal power of a Co-plaintiff to release *puis darrein continuance*.

THE Plaintiffs were executors, and the Plaintiff *Jones* had instituted this action, which was debt on bond, to recover from the Defendant money belonging to the testator's estate, which had been lent to the Defendant by the Plaintiffs. The Defendant had recently pleaded a release by the Plaintiff *Matthews puis darrein continuance*. *Shepherd*, Solicitor-General, on behalf of the Plaintiff *Jones*, in *Hilary* term, obtained a rule *nisi* to set aside the plea, and to have the release given up to be cancelled, and that the Plaintiff *Matthews* might pay the costs. He moved this, suggesting that the Plaintiff *Jones* was the party beneficially interested, and that the Plaintiff *Matthews* was a mere trustee. *Legh v. Legh* (a).

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Vaughan, Serjt., now showed cause upon affidavits that the Plaintiff *Jones* had in her hands sufficient of the testator's money to satisfy all her beneficial interest in the trust funds, that the Plaintiff *Matthews* approved of the loan made to the Defendant for a time, and that he had since received from the Defendant the sum sued for, but not the costs, which were left for the Plaintiff *Jones*, who had brought the action, and he had now occasion to apply the money received for the benefit of other *cestui que trusts* under the will.

Copley, Serjt., appeared for the Plaintiff *Matthews*.

Per Curiam. In this case, where the Co-plaintiff is by law competent to give a release, and we are called upon to set it aside, against the law, upon the ground of fraud, the Plaintiff applying must make out a very strong case of fraud, and she makes none. We must leave the several instruments to their legal effect.

Rule discharged.

(a) 1 Bos. & Pull. 447.

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May 2.

IN debt on award, the Plaintiff averred that by an agreement, reciting that the Plaintiff had at the *Stafford* general quarter sessions preferred a bill of * indictment against the Defendant for an assault, to which he pleaded not guilty, and traversed the indictment, and the same came on to be tried at the following sessions, when the Defendant was convicted of the assault, but the judgement of the Court was respited until the ensuing sessions, and that the Defendant claimed to be entitled to the possession of a piece of land which was disputed by the Plaintiff; and that at the last-mentioned sessions the Plaintiff moved for judgement for the assault, and offered to give in evidence another assault subsequently committed upon the Plaintiff, in aggravation of the judgement; but it was recommended by the Court that the several assaults and the disputed right of possession, and all other questions and matters whatsoever in dispute between the parties, should be submitted to the award of *M. A. W.*; In pursuance of the recommendation of the Court, and of the mutual wishes of the parties, they thereby agreed reciprocally, that the Plaintiff, on his part, would perform the award of the arbitrator touching the several assaults, and the disputed right of possession, and all other questions and matters whatsoever in dispute between the parties, and concerning all costs, charges, and expenses incident to the indictment, and subsequent proceedings thereon, and all other costs, charges, and expenses, relating thereto. And the Plaintiff averred that the arbitrator made his award, and thereby awarded that the Defendant should pay the Plaintiff 10*l.* in satisfaction of the assaults, and 50*l.* in satisfaction and discharge of all the Plaintiff's costs, charges, and expenses incident to the indictment, and previous and subsequent proceedings thereon, and of all other costs, charges, and expenses relating thereto, and in satisfaction of all other claims and demands of the Plaintiff against the Defendant referred to the arbitrator; and that the Defendant should pay his own costs incident to the indictment and previous and subsequent proceedings thereon, and all his other costs, charges, and expenses relating thereto, and showed a breach in nonpayment. Upon demurrer and joinder, *Vaughan*, Serjt., in support of the demurrer,

Under a submission to arbitration of two assaults (for one of which the Defendant had been indicted, and convicted at the quarter sessions), and of all costs incident to the indictment and subsequent proceedings thereon, the arbitrator awarded a payment in satisfaction of all costs incident to the indictment and previous and subsequent proceedings thereon: Held, 1. That the indictment and assaults might legally be referred. 2. That the arbitrator did not thereby exceed his authority.

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1817. demurrer, contended, that the arbitrator had exceeded his authority in awarding 50*l.* in satisfaction of the Plaintiff's costs incident to the indictments, and *previous and subsequent* proceedings thereon; the submission being limited to costs incident to the indictment and *subsequent* proceedings thereon. If the parties had intended to give the arbitrator power over the costs of the previous proceedings, they would have expressed it. The word *subsequent* excludes all prior costs, and the Court cannot repudiate the word *subsequent*, nor insert in the submission the word *previous*, which is requisite for the Plaintiff's construction. The arbitrator, feeling that the word *subsequent* gave him no power over them, purposely inserts the word *previous*, to enlarge his jurisdiction, and the words "relating thereto" in the submission, do not supply the word *previous*. There is nothing apparent on the face of the award by the aid whereof the costs may be apportioned, and the subsequent costs separated from the previous costs; therefore the award is bad for the whole 50*l.* No case can be cited. Next, the matter is not arbitrable between the parties. Criminal matters are to be punished. The Court of Quarter Sessions have no power to delegate the matters of indictment. *Rex v. Harding* (a). "A judge of *nisi prius*, by consent of the parties, may make a rule to refer a cause, but the sessions cannot do so, though by consent. They may refer a thing to another to examine, and make report to them for their determination, but they cannot refer a thing to be determined by the other." In the case of *Rex v. Rant* and *Rex v. Coombs* (b), an indictment and a counter-indictment for a riot and assault were referred, and the case turned on the point whether this sort of matter could be so referred.

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Lens, Serjt., *contra*. The arbitrator has used this word fully to express his conception of what the power given him was, but he has gone therein no further than the power warranted, which extended to all costs, charges, and expenses incident to the indictment, and subsequent proceedings thereon: he awards no costs which are not incident to the indictment. As to the legality of the submission, the case of *Beeley v. Winkfield* (c) goes the whole length of this case. That was an action upon a promissory note. An objection was taken, that it was given on an illegal consideration, namely, that the Defendant being indicted

(a) 2 Salk. 477.

(b) *Kyd's Law of Awards*, 61. and *Caldwell's Treatise on the Law of Arbitrations*, 5.

(c) 11 East, 46.

for a matter cognizable before a criminal Court, the Quarter Sessions, for mal-treating his apprentice, the Court agreed to diminish his punishment, if he would pay the costs of the indictment, and he gave his promissory note for the amount; and it was argued that the note was void, but the Court of King's Bench held that the Plaintiff was entitled to recover.

GIBBS, C. J. The counsel for the Defendant has raised two objections to this declaration; 1st, that the arbitrator has exceeded his authority; 2dly, that the parties have exceeded theirs, in referring this matter. As to the first point, if we look to the words of the authority, and the words of the award, it is impossible to say that the arbitrator has exceeded his authority. The words of the authority are, all costs, charges, and expenses incident to the indictment and subsequent proceedings thereon. There can be no doubt in the world, that the subsequent proceedings are all incident to the indictment, and that the words are only used there from a looseness of mind in the party penning it. No doubt the costs of going before the grand jury are also incident to the indictment, and the arbitrator in finding the previous and subsequent costs, has found them to be incident to the indictment, and has well given them. As to the 2d point, the parties have referred nothing but what they have a right to refer. They have referred the several assaults: these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute refers all other their civil rights, which may well be referred; and the case cited by the counsel for the Plaintiff recognizes the principle which we establish. I am of opinion, therefore, that nothing is referred but what may properly be a matter of reference.

DALLAS, J., expressed himself to be of the same opinion on both points.

PARK, J. No one can say there are not many costs incident to indictments, which arise before the indictment is put on the table, and those costs, whether previous or not, are included in the word incident. As to the 2d point, I am very glad that a case has been cited which puts the matter out of all doubt.

BURROUGH, J., concurred in giving

Judgement for the Plaintiff.

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May 2.

DOE, on Demise of WEBB, v. GOUNDRY.

The Plaintiff in error in ejectment, is not bound to give the Defendant in error notice of his entering into the recognizance pursuant to 16 & 17 Car. 2. c. 8. s. 3. to pay costs on affirmance.

The practice has been to take a recognizance in double the annual rent of the premises when that can be ascertained. The Plaintiff in error in ejectment is not required to find bail to join in his recognizance to pay costs on affirmance.

LENS, Serjt., had on a former day obtained a rule *nisi* for setting aside the execution that had been issued in this case, and restoring the money levied for the costs, upon the ground that a writ of error had issued, and the Plaintiff in error had before the execution entered into the recognizance required by the statute 16 and 17 Car. 2. c. 8. s. 3., for payment of costs in case of affirmance of the judgement, whereupon the writ of error operated as a *supersedeas*.

Best, Serjt., showed cause against this rule, upon the ground that the Defendant in error had received no notice of the Plaintiff's entering into the recognizance, which, he contended, was requisite, if the recognizance could be entered into *sub silentio*, neither had the Court an opportunity of judging whether the penalty of the recognizance were sufficient, nor the Plaintiff below of knowing whether he was entitled to execution on his judgement, and it could not be allowed that his proceedings should be set aside, when he was apparently regular, and he had no opportunity of knowing that he was irregular: he referred to *Roe v. Pearson* (a), as establishing the practice, that the penalty of the recognizance in this Court shall be two years' value of the mesne profits, and double costs; but the Defendant in error ought necessarily to have the means of checking the Plaintiff's representations of the amount of the mesne profits: it could not be permitted that the officer should proceed upon the bare assertion of the party, whose interest it was to depress and conceal the value. In all cases of bail, the bail is nothing, until notice thereof is given. If the Plaintiff in error give even a subsequent notice, that he has entered into his recognizance, and thereupon the Defendant in error can bring the amount before the Court in review, in the nature of a rule for better bail, the Court will judge whether the recognizance is sufficient.

Lens supported his rule.

Cur. adv. vult.

GIBBS, C. J. There was a case in which application was made to set aside an execution in ejectment, on the ground that a writ of error had been sued out, and that the Plaintiff in

(a) *Barnes*, 103.

error had entered into the required recognizance, which stayed the proceedings, before the date of the Plaintiff's execution. In this case no bail in error were to be put in, but the party himself was to enter into his own recognizance. The objection was, that no notice had been given to the Defendant in error, either before the act, that the Plaintiff in error would enter into such a recognizance, or since the act, that he had entered into a recognizance; this, therefore, is wholly 'a question of regularity, and whether it be regular or not, depends wholly on the practice of the Court. Upon the motion, the counsel not being able to inform us what the practice is, we have taken time to inquire; and we are informed by the clerk of the errors, that the practice in ejectment, wherein no bail are to be put in, but a recognizance is at all events to be taken, is, that he governs himself in fixing the penalty of the recognizance by the amount of the rent of the premises, and takes the recognizance in double the annual rent. I asked what would be the course in a case where no rent had been paid, but the land in the occupation of the party; the officer answered, that he should in such a case refer to the Court to know what he ought to do, but that such a case had never occurred in his long practice. The conclusion is, that no practice requires that any such notice should be given, consequently, in the practice that has been here pursued, the recognizance was regular, and the rule must be absolute, for setting aside the execution with costs. The Plaintiff might search, to see whether the Defendant had entered into any recognizance.

Rule absolute.

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TRINGHAM v. BETHUNE.

May 2.

IN replevin for taking the Plaintiff's goods in a certain dwelling-house, the Defendant avowed and made conusance by reason that *B. Andrade*, being seised in fee, had demised the house for ninety-nine years to *Phillips*, rendering rent, who demised for twenty-one years to the Plaintiff, at 24*l.* rent, and demised the reversion to *B. Jacob* for eighty-nine years, who granted an annuity to the Defendants for three lives, charged on the premises, with power of distress and entry, and avers a proviso that if the grantor should at any time thereafter be

desirous

If a power to redeem an annuity upon six months' notice, terminating on one of the days of payment, be memorialized as a power to redeem at any time on six months' notice, the misdescription is fatal.

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desirous of re-purchasing the annuity, and should give the grantee six calendar months' notice in writing at any of the stated times for paying the annuity, of such his desire, and at the expiration of the notice should pay the grantee 800*l.* and all arrears, then the grantee would accept 800*l.* as the price of the repurchase, and would release; and he shows the annuity due, and the Plaintiff's rent in arrear, and distress taken for the arrears. Upon oyer prayed, the grant appeared to contain a proviso for redemption corresponding with the statement thereof in the avowry, but the Plaintiff, amongst other pleas, pleaded, 8thly, that no memorial had been enrolled, containing the proviso for redemption of the annuity, and the true time and terms of such power of redemption; and in the 12th plea he stated the memorial which was enrolled, and which expressed a proviso, that if the grantor should be desirous to repurchase the annuity, it should be lawful for him so to do, upon giving six months' notice in writing of such his intention, and paying back to the grantees 800*l.* and all arrears, and that thereupon the grantees would release the annuity; and that no other memorial was enrolled. The Defendant replied to the 8th plea, that a memorial was enrolled, which he set out, stating the proviso as it was stated in the 12th plea, and the Defendant demurred to the 12th plea. The Plaintiff demurred to the Defendant's replication to the 8th plea, and joined in demurrer to the 12th. The Defendant joined in demurrer to the replication to the 8th plea.

Shepherd, Solicitor-General, who was to have argued for the Plaintiff, was stopped by the Court, who called upon

Vaughan, Serjt., to support the memorial. He admitted that he could not answer the objection that there was a material discrepancy between the deed and the memorial, the proviso in the deed requiring six months' notice of redemption, terminating upon one of the half-yearly days of payment, and the memorial stating it as a power to redeem upon six months' notice, terminating at any time.

Judgement for the Plaintiff.

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(IN THE EXCHEQUER-CHAMBER.)

HARRISON v. KING; in Error.

May 8.

THIS was a writ of error on a judgement of the King's Bench.

The Plaintiff below in his fifth count declared, that the Defendant below in a certain discourse which he the Defendant then and there had in the presence and hearing of one *James Stevenson*, then and still being a client of the Plaintiff below, in the way of his profession and business of an attorney, intending, as aforesaid, in the presence and hearing of the said *James Stevenson*, falsely and maliciously spoke and published of the Plaintiff the false, scandalous, malicious, and defamatory words following; "I will take him to *Bow-street* upon a charge of forgery," thereby meaning that the Plaintiff below had been and was guilty of forgery. After verdict for the Plaintiff below with 1500*l.* entire damages on all the counts; and judgement thereon, error was assigned, "that the words did not import any express or precise imputation of the Plaintiff below having committed forgery, but only an intention of the Defendant below to take the Plaintiff below to *Bow-street* (without showing where in that street, or for what purpose) upon a charge of forgery (without stating by or against whom made, or to be made, or of what forgery), and which words of themselves constituted no cause of action, although they were laid in a separate count as a separate cause of action without any special damage."

No action lies for these words, "I will take him to *Bow-street* on a charge of forgery," without innuendo.

E. Lawes, was prepared to argue for the Plaintiff in error; and no one appearing for the Defendant in error, he prayed that the judgement might be reversed.

GIBBS, C. J., cited the cases of *Wood v. Merrick* (a), and *Pollard v. Mason* (b).

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Judgement reversed.

(a) 1 Ro. Ab. Action sur Case, Z. p. 73, pl. 21.

(b) Ibid. S. C. Hob. 305. 326. See also the cases of *Powell and Winda*, Hob. 305. 327. Hul. 41. S. C. Thomas and Axworth, 1 Rol. Abr. tit. Action on the Case, 66. a. pl. 11. l. 25. Bull and May, 1 Sid. 220. Hare and Meller's case, 3 Leon. 138, Holt and Scholefield, 6 T. R. 691. Com. Dig. tit. Action on the Case for Defamation, F. 1. 13., which *Lawes* was prepared to cite.

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(IN THE EXCHEQUER-CHAMBER.)

May 8.

STONE v. MACNAIR; in Error.

Indebitatus assumpsit by the husband for money lent to the wife, at the wife's request, cannot be supported.

But, for money lent to the wife at the husband's request is good.

So, for money lent to the Plaintiff and wife, at the request of the Plaintiff, and wife; for the wife shall be rejected as surplusage.

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THIS was a writ of error brought to reverse a judgement of the Court of King's Bench, which had passed by default for the Plaintiff below upon a count for money lent to the Plaintiff below and his wife at his and his wife's request, and upon another count for money paid for the use of the wife of the Plaintiff below, at the request of the said *Elizabeth*, the wife of the Plaintiff below; and in both counts was stated a promise by the husband to pay. *Chitty* for the Plaintiff in error referred to the authorities collected upon the doctrine of "consideration executed," by the learned editor of *Saunders*, in the case of *Osborne v. Rogers* (a) and to *Hayes v. Warren* (b), as establishing, that no *assumpsit* could be supported against the husband, for money advanced to the wife, unless it had been advanced upon the husband's precedent request, which was not here alleged. The allegation of a request by the wife was not equivalent nor sufficient. Neither did it appear that she was his wife at the time of making the contract; and if not, then, according to *Mitchison v. Hewson* (c), the declaration was clearly bad; and even if it be taken that it appears on the record that she was then his wife, still, as she was known to be covert, and the contract is with her, not with her husband, according to *Bentley v. Griffin* (d), the Plaintiff cannot recover. And though it was held in *Stephenson v. Hardy* (e), that a Plaintiff may recover for money lent to the wife, upon the express request of the husband, yet the law does not imply such a request.

Tindal, contra. After judgement by default, enough appears on this declaration to sustain the judgement. As to the count wherein the consideration is stated to be money lent to the husband and wife, at the request of the husband and wife, it is clearly good, for though the wife has no authority to request or promise, yet the utmost result is, that the promise of the wife shall go for nothing, and then the promise of the husband will stand alone.

(a) 1 *Wms. Saund.* 264. n. 1.
(b) 2 *Str.* 933.

(c) 7 *Term Rep.* 348.
(d) *Ante*, V. 356.

(e) 3 *Wils.* 388.

Utile per inutile non vitiatur. As to the count for money paid and laid out for *Elizabeth* the wife of the said *Thomas*, at the request of the said *Elizabeth* the wife of the said *Thomas*, it thereby sufficiently appears that she was, at the time of the loan, the wife of the Plaintiff below; and so *Mitchinson v. Hewson* does not apply. *Butcher v. Andrews (a)*. Money lent by *A.* to *B.* is not a sufficient consideration for an *indebitatus assumpsit* to pay by *C.*, but where money is lent to a wife, it is. In *Stephenson v. Hardy*, which was an action for money lent to the wife at the husband's request, it was said, that though money might be advanced, it could not be lent, to a wife, but the Court did not admit the doctrine. There is nothing, therefore, to vitiate in the expression of a loan to the wife; there is nothing that prevents the husband from being liable for it; and though here it is at the request of the wife, and ought to be at the request of the husband, yet, after judgement, the Court will intend that the wife was acting as the agent of the husband.

GIBBS, C. J. The difficulty of a loan to the wife is got over by the authority of *Stephenson v. Hardy*; but what is wanted is a request of the husband, which cannot be supplied. This case has been extremely well argued by the counsel on both sides.

Judgement reversed.

(a) 1 Salk. 23. S. C. 3 Salk. 15. Comb. 473. Carth. 446.

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JOHN JAMES, Junr., Demandant; WILLIAMS, Tenant; MARIA JAMES, Vouchee.

May 9.

BOSANQUET, Serjt., moved to amend the caption of the warrant of attorney in a recovery. The writ of entry stated, *inter alia*, 130 acres of pasture, pasture for 30 beasts, &c. The writ of *dedimus potestatem* pursued this writ exactly as it ought to do, but in transcribing the terms of the *dedimus potestatem* at the head of the warrant of attorney, the clerk, supposing that the repetition of the word pasture was a mistake, had omitted to repeat it in the recital of the writ at the head of the warrant of attorney, so that it stood as 130 acres of pasture for 30 beasts. He was aware that the Court had held that they could not

The caption of the warrant of attorney in a recovery is not so conclusively a part of the deed of the party, but that it may be amended after execution by the writ of entry.

1817. amend a warrant of attorney, because it was the deed of the party (a), but the Court had never yet held so conclusively that this caption * was a part of the warrant of attorney, that they may not amend the caption.

JAMES
Demandant,
&c.

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Fiat (b).

(a) *Fox, Demandant; Bembow, Tenant; Earl Gower, Vouchee, ante, VI. 652.; and Forster, Demandant; Forster, Tenant; Darcy Bolton and Wife, Vouchees, ante, VI. 372.*

(b) But where no person has discovered that he is interested to exhibit an affidavit, showing the caption to be incorrect, the caption may be called in aid as a part of the warrant of attorney, to expound the operative part thereof as an authority to gain and lose in a plea of the premises mentioned in the caption, and to supply defects * in the body of the warrant. Therefore, though a warrant of attorney cannot be amended directly, yet if a party amend the caption of the warrant of attorney, *quære* whether he may not indirectly, through that medium, extend the authority of the warrant of attorney so as to be an authority to gain and lose in a plea of other premises than were presented to the party's notice when he executed the warrant of attorney.

* *Forster, Demandant, &c. ubi supra.* And see *Clutterbuck, Plaintiff; Brabant, Defendant, ante, VI. 1.*, where it was ruled *contra*.

May 10.

SPINK v. HITCHCOCK.

The statute 51 G. 3. c. 124. s. 1. does not avoid the Plaintiff's proceedings and judgement, by reason of his arresting for a sum exceeding 15*l.* and recovering a less sum than 15*l.*

THE Plaintiff, although she had arrested the Defendant for 17*l.* and upwards, at a time when the Plaintiff was indebted to the Defendant in 19*l.* for rent due, and in 12*l.* for the costs of an action brought by the Defendant against the Plaintiff, in which the Defendant had been nonsuited, had at the trial of this cause recovered only 6*l.* 11*s.* The Defendant was in prison, and, as it was sworn, brought these actions against her landlord vexatiously, and had swelled her apparent demand, by delivering a second bill of parcels, giving therein new names to articles which had been charged in a former bill.

Vaughan, Serjt., now moved that all proceedings theretofore had in this action might be held void and of none effect, and that all subsequent proceedings therein might be stayed. He conceived he was entitled to this promotion by the statute 51 G. 3. c. 124. s. 1., which, reciting all the prior acts that have passed on the subject of arrests, enacts, that no person shall be held to special bail upon any process issuing out of any court, where the cause of action shall not amount to 15*l.* or upwards

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upwards, exclusive of costs, and that where the cause of action in any court shall not amount to the sum of 15*l.*, exclusive of costs (except as thereinbefore is excepted, viz. on bills of exchange and promissory notes), no special writ or writs, nor any process specially expressing the cause of action, shall be sued forth or issued from any court, in order to compel any person or persons to appear thereon in such court; and all proceedings and judgements that shall be had on any such writ or process, shall be, and are thereby declared to be, void and of none effect. He urged that the true construction was, that if the Plaintiff held the Defendant to bail for more than 15*l.*, and did not recover 15*l.*, all the proceedings were void: he admitted, that he was not aware of any decision of any court upon this act.

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GIBBS, C. J. We think the facts stated in this affidavit are not admissible. We think this act is intended to prevent arrests for 15*l.* in the same cases where the former act, 19 G. 3. c. 70., prevented arrests under 10*l.* The present application supposes that the act requires the proceedings to be set aside, unless a certain sum is recovered: The Defendant's construction of the act makes it imperative on the Court to set aside the proceedings, if the Plaintiff does not recover 15*l.*: it puts the validity of the proceedings on the event of the trial, not upon the existence of reasonable grounds for the action. This act recites (among certain former acts), that by the 5th G. 2. c. 27. it is enacted, that where the cause of action shall not amount to 10*l.* and upwards, in any superior court, or to 40*s.* or upwards in any inferior court, no special writ or writs, nor any process specially therein expressing the cause or causes of action, shall be sued forth or issued from any such superior or inferior court, to compel any person to appear thereon in such court or courts; and all proceedings and judgements upon any such writ are thereby declared to be void and of none effect. It is to be observed that the expression in that statute is, as in this, that where the cause of action shall not amount to the sum named or upwards, the proceedings and judgement shall be void and of none effect. Did any person ever dream, that in an action, brought before the statute of 51 G. 3., if, after an arrest for 10*l.*, the Plaintiff recovered less than 10*l.*, the proceedings should all be void? This act, after the several recitals, proceeds in the terms of the statute 19 G. 3., that no person shall be held to special bail upon any process issuing out of any court where the cause of action shall not have originally amounted to the sum of

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1817. 15*l.*; but all the former acts apply to the quantity of the debt sworn to, on which the Defendant is held to bail. Where a Plaintiff arrests a man for less than 15*l.*, without affidavit, there the proceedings are void; but where a Plaintiff arrests on an affidavit and recovers less than 15*l.*, if there be any ground for relief at all, it is a case within the 43 G. 3. c. 46.

The rest of the Court concurred in refusing the rule.

May 12.

LOCK v. CRADDOCK.

The prothonotary, making out a writ of *supersedeas* upon perfecting bail, is in future to retain the order for the *supersedeas*, which is exhibited to him as his instructions for the writ.

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THE Defendant was arrested for 20,000*l.*, and final judgment for that sum was signed on the third of May. Two persons were put in as bail, and justified as for a debt of 20*l.* 14*s.* and the motion-paper was * indorsed to justify in that sum. They entered into a recognizance in the sum of 41*l.* 8*s.* The Plaintiff's attorney was never served with any notice of putting in bail or of the justification. There was, however, an affidavit of the service of notice of bail on the Plaintiff's attorney, purporting to be made by *Thomas Mason*, 16, *Aldersgate Street*, but no such person had ever lived, or was now known, at that house, and the only attorney that could be found of the same name which was indorsed on the proceedings, as the Defendant's attorney, was a respectable practitioner, who swore he knew nothing of the cause. The bail were not resident at the places at which they were in the notice of bail represented to reside, nor could they be found, and the use they had made of the justification, was, to alter the 20*l.* 14*s.* in the order for the writ of *supersedeas*, into 20,000*l.*, upon exhibiting which they had obtained a writ of *supersedeas*, which was served on the warden of the *Fleet*. The rule for the allowance of bail does not specify the sum for which bail is put in, nor does the writ of *supersedeas*; but the order for the *supersedeas* does. The warden of the *Fleet* thought it prudent to examine the recognizance of bail, and found it to be taken in 41*l.* 8*s.* only, upon which he declined to discharge the Defendant.

Best, Serjt., under these circumstances had obtained a rule *nisi* to set aside the justification of bail, and the writ of *supersedeas*, and that the Defendant might answer the matters of the affidavit,

affidavit, and that service of the rule upon the Defendant in person, who was still in custody, might be good service.

On this day, no cause being shown, he made the rule absolute. Upon which occasion the Court observed that the practice had hitherto been, that upon sight of the order for a *supersedeas*, which does contain the sum for which bail is said to be given, the prothonotary makes out a *supersedeas*, which does not specify the sum for which the bail is given,* and delivers it to the Defendant's attorney as the warrant for the warden to discharge the prisoner. It was therefore extremely important, as it might be, in some part, at least, a discharge to the prothonotaries, that the prothonotary should be careful in future to retain the order on which he makes out the *supersedeas*, and not to return it to the party who gives the instructions.

Rule absolute (a).

(a) See *Regula generalis*, made on the occasion of this case, *post*, end of this term.

WILLISON v. PATTESON and Others.

May 12.

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THIS was an action of *assumpsit*, upon three bills of exchange, accepted by the Defendants, and indorsed to the Plaintiff, and for money lent and advanced, paid, laid out, and expended, had and received, for interest, and on an account stated; to which the Defendants pleaded, first, the general issue, *non assumpsit*, upon which issue was joined; and 2dly, the statute of limitations, whereto the Plaintiff replied, that at the time when the causes of action accrued, the Plaintiff was not within the kingdom, but in parts beyond the seas, to wit at *Dunkirk* in *France*, and that he continued there until the commencement of this suit, and that he did not during all that time arrive, or come to, or within this kingdom. The rejoinder thereto denied that the Plaintiff remained and abided out of the kingdom during the time stated in the replication, upon which issue was joined. The cause was tried *before *Gibbs*, C. J., at *Guildhall*, at the sittings after *Trinity* term, 1816, when the jury found a verdict for the Plaintiff, damages 562*l*.

No contract made with an alien enemy in time of war can be enforced in a court of *British* judicature,

Although the Plaintiff do not sue until the return of peace,

And although the Plaintiff be an *English-born* subject, resident in the hostile country.

The defendant, a *British* subject resident here, having in his hands the proceeds of certain goods of *A.*, an alien enemy, *A.* drew on the Defendant, payable to

his own order, and indorsed the bill to the Plaintiff, an *English-born* subject resident in the hostile country, who sued on the bill after peace restored: Held that he could not recover.

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10s., subject to the opinion of this Court upon the following case. In *May*, 1803, the Defendants *Patteson* and Co., were merchants and co-partners, in *London*, and were the holders of one hundred pieces of cambric, the property of *M. Varlét* of *Dunkirk*, in *France*, who being indebted to *Michelon*, also of *Dunkirk*, assigned and transferred his right and interest in those cambrics, to *Michelon*, of which the Defendants had due notice; and *Michelon* on 25th *Nov.*, 1803, being then resident at *Dunkirk*, drew three similar bills of exchange upon the Defendants, for 100*l.*, 270*l.*, and 130*l.*, one of which is as follows:

Dunkerque, le 25th *Nov.* 1803, pour 100*l.* sterling.

A trois mois de datte paies par cette seconde de change (la premiere ne l'étant), a mon ordre, la somme de cent livres sterling, valeur en moi meme, que passeres suivant l'avis de

A Messieurs

Bon pour cent livres sterling.

Messrs. *Pattison*, *Lee*, & *Iselin*,
 à *Londres*.

L. Michelin.

Indorsed.—Payes a l'ordre de Mr. *T. Willison* valeur recue comptant. *Dunkerque*, la 26th *Nov.*, 1803.

L. Michelin.

[441] Which bills were duly remitted to the Defendants, and by them accepted on 3d *Jan.*, 1804, payable as soon as certain cambrics should be sold, which said cambrics were afterwards sold, and the produce received by the Defendants on the 7th *Jan.*, 1804. These bills were also indorsed for a valuable consideration, by *Michelon* at *Dunkirk*, to the Plaintiff, who is an *English*-born subject, but who then resided, and still continues to reside at *Dunkirk*. At the time of drawing, accepting, and indorsing these bills of exchange, *France* and *England* were in an open state of war with each other, and *Michelon* was then an alien enemy, but before and at the time of bringing the present action, peace was restored between the two countries. If the Court should be of opinion, that the Plaintiff was entitled to maintain this action, then the verdict was to stand. But if the Court should be of opinion, that the Plaintiff could not maintain this action, in that case a nonsuit was to be entered. This case was to be turned into a special verdict if the Court should think proper so to direct.

Lens, Serjt., for the Plaintiff, anticipated that the objection to be made to the Plaintiff's right to recover, would be, that though the Plaintiff was a native of this country, he was at the
 time

time of drawing the bills resident in *Dunkirk*, then an hostile country, and that he could not, by drawing on a house in *London*, in time of war, withdraw his funds from this country, nor could the holder derive any advantage from a security made over to him under such circumstances. But the proposition that no contract could be made with an alien enemy, which could be supported in an *English* court of justice, was much too broad: it had been in certain cases holden, that even a trading with an enemy was legal; and a contract for insurance on the trading with an enemy had, until the decision of *Potts v. Bell* (a), been held legal. Lord *Kenyon* there held, indeed, that for a *British* subject to trade with an enemy was illegal. But in *Gist v. Mason* (b) it had been held that such contracts were not necessarily illegal; and much pains it cost to arrive at that, as a general conclusion, after an argument by civilians on that question. If any such plain and obvious principle had ever before existed, it can hardly be supposed that the doctrine should have been entirely forgotten. If there be such an universal position, that no contracts with an enemy can be sustained, the cases of *Antoine v. Morshead* (c) and *Daubuz v. Morshead* (d), ought to have been put on that ground. And if that objection was therein urged, then those cases are a still stronger authority for the Plaintiff. If it be considered that that which was there done by the parties did not contravene the law of this country, that is the whole length to which the Plaintiff needs to carry this case. Ransom bills were held legal up to a late period, and they were put an end to by act of parliament (e), not by construction of law. In *Sparenberg v. Bannantyne*, the general principle is laid down, upon a question whether an alien born, taken prisoner at war, could sue in our courts; and it was held that it was not essential that an enemy should be alien born; it was only needful that he should be an alien enemy. This was antecedent to the case of the *Hoop* (f) in the Court of Admiralty, and to *Potts v. Bell* (g). The right to sue is correlative. The statute 34 G. 3. c. 9., which prohibited payment even of the justest debts, was, certainly, introductory of a new law, and was meant so to be: it was a special act made during a war, and expired with the war. Admitting the force of Sir *J. Nicol's* (h) argument, that it is inconsistent

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(a) 8 Term Rep. 548.

(d) Ante, VI. 332.

(b) 1 Term Rep. 84.

(e) 22 G. 3. c. 25. 35 G. 3. c. 66. ss. 37, 38, 39.

(c) Ante, VI. 237.

(f) 1 Rob. 196.

(g) 8 Term Rep. 548.

(h) Ibid. 554.
that

1817. that there should be war for one purpose, and peace for commercial purposes, yet the mere paying a private debt is very short of commercial intercourse: the Plaintiff does nothing, except that he takes an order for payment of his debt, which he does not attempt to enforce till the return of peace.

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Best, Serjt., contrà. This question has long been considered as perfectly at rest, upon the broad principle that all trading with an alien enemy is illegal. This is fully laid down in *Potts v. Bell*, and most ably put there by Sir *J. Nicol*. In *Gist v. Mason*, Lord *Mansfield*, C. J., does mention the authority of two cases, abundantly sufficient to show that the law had been long established. "A short note in *Ro. Ab. (a)*, where a trading with *Scotland*, then in a general state of enmity with this kingdom, was held to be illegal; and the other was a note which is now burned, which was given to me by Lord *Hardwicke*, of a reference in King *William's* time, to all the judges, whether it were a crime at the common law, to carry corn to the enemy in time of war; who were of opinion that it was a misdemeanor." How then can a contract arise out of a matter, which by the common law of the land, as declared by the twelve judges, is held to be a misdemeanor? This doctrine has been confirmed too by the cases of *Brandon v. Nesbit (b)*, and *Bristow v. Towers (c)*, which determined that an insurance of the property of an alien enemy is illegal and void. In the case of *McConnell v. Hector (d)* it was decided that a subject residing abroad is to be considered as a foreigner. Lord *Eldon*, Chancellor, in his judgement in the case *Ex parte Boussmaker (e)*, says, "If this had been a debt arising from a contract with an alien enemy, it could not possibly stand; for the contract would be void." The present is not the case of a contract made in peace, and suspended by war, that can at the return of peace be set up again. It may be admitted, that the adoption of this doctrine in modern times originated in the Admiralty Court; for Lord *Mansfield* kept it out of the sight of the courts of common law as much as he could. In the case of the *Hoop (f)*, Sir *W. Scott's* judgement is conclusive. In *Villa v. Dimock (g)*, the same principle is established. *England* was the last state which in modern times came into this rule, making contracts with an enemy in all cases illegal, unless under the exceptions

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(a) 2 *Ro. Abr.* 173. *Prerogative Le Roy. L. Guerre*, pl. 3. P. 13 E. 2. B. R.

(b) 6 *Term Rep.* 23.

(d) 3 *Bos. & Pull.* 113.

(f) 1 *Rob.* 198.

(c) *Ibid.* 55.

(e) 13 *Ves.* 71.

(g) *Skin.* 370.

prescribed

prescribed by license from the sovereign. There may be pecuniary advantages derived from the continuance of commerce with a neighbouring nation during a state of war, but it is restrained by considerations of much superior cogency. In the present case these reasons most forcibly apply. The bill is payable to the order of the drawer, and is not indorsed till the next day after the making. It is indorsed to a *Scotchman*, resident at *Dunkirk*, who was therefore then an alien enemy. In no case referred to has this principle ever been doubted. In *Sparenberg v. Bannantyne*, it was held that the Plaintiff was not an alien enemy, but it was not denied, that while he was in the enemy's service he owed the hostile sovereign a temporary allegiance. It was held, that he need not be *alien né*, but that it sufficed if he were an alien enemy at the time. If the act of peace gave every prisoner the right of returning to his country, it would be unnecessary to stipulate in treaties, as universally is done, for his return to his country. It may be admitted that the 34 G. 3. c. 9. was introductory of a new law (and the state of things then required new securities), without admitting any inference adverse to the general rule, that all trading with an enemy is illegal. Here goods are sold, and bills are drawn for the price of those goods; this therefore is illegal. The case of the *detenús* in France is very distinguishable. It stood on its own peculiar principle. It is impossible that persons shut up in the enemy's country by an abuse of the privileges of war, should be considered as alien enemies, nor would the defenders of our country, if taken captive, be involved in that disability.

Lens, in reply. The argument for the Plaintiff destroys itself, for the law cannot depend upon the degree of hardship. It was held when those cases of *Antoine v. Morshead*, and *Daubuz v. Morshead* were decided, that they did not establish this principle. Those cases were the converse of this: there an *English* gentleman resident in *France* drew on *England* in favour of an enemy resident there. If all the *detenús* were liable to be starved, it would be a ground for the legislature to legalize their commerce, by a new act of parliament, but it would not make their bills legal. The Plaintiff's argument has never controverted the doctrine of *Potts v. Bell*, and it admits that if this were a contract of that sort, its legality could not for a moment be maintained. But these bills were not a payment for those cambrics: the mention of the cambrics was only material in this

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case, as showing that the conditional acceptance, payable on payment for the cambrics, had become absolute. It is said, that these bills were drawn for the produce of those cambrics. There might be something like a commercial dealing between the Defendant and *Michelon*, but not between the Plaintiff and the Defendant. *Willison*, the payee and indorsee of the bill for a valuable consideration, is not stated on the case to have notice of the purpose for which the bills are drawn. He does not appear to have had any interest in the sending of those cambrics into this country: he is no further connected with the cambrics than this, that as soon as the cambrics are sold, *Michelon* has a fund in this country, out of which he draws, payable as soon as that fund is productive, in favour of his creditor the Plaintiff. But it is necessary for the Defendant to show, that if an alien enemy has a fund in *England*, on which he has a right to draw, he cannot pay a private debt to another out of that fund. It by no means appears that the debt from *Michelon* to the Plaintiff did not arise for goods sold and used in his own country. The Defendant must therefore establish, that if a foreigner send goods here, which escape confiscation, the proceeds of the sale of the goods are so far tainted, that he can never pay a debt out of that sum. If it were material, the Plaintiff would be entitled to add to the case the fact that the Plaintiff had nothing to do with the sending over of the cambrics. Much of the Defendant's argument rested on the supposition that he had. But having thus thrown the cambrics out of the case, the Plaintiff is upheld by the authorities, in contending, to the full extent, that an alien enemy may in time of war legally draw on a fund in this country; for otherwise *Antoine v. Morshead*, and *Doubuz v. Morshead* cannot be supported. In the case *Ex parte Boussmaker*, Lord *Eldon* does not go the length which the Defendant's argument requires; his *dictum*, however, ought to go no further than the case to which it relates; and even if it be a just inference, that it was meant to be so general, this Court must pronounce whether there is any foundation for so unlimited a position, which the case then in judgement did not call for, and which is not supported by any authority. In the case of *Bell v. Gilson* (a) it was doubted, by so venerable an authority as *Heath, J.*, whether a trading with an enemy was illegal. Neither the judgement of *Sir W. Scott*, nor any other, goes to the length, that

(a) 1 Bos. & Pull. 355.

when war prevails, no payment of a subsisting debt by an alien enemy can possibly be legal, it not being shown how that debt arose. All that appears here is, that *Michelon* being indebted to the Plaintiff, who was resident in the same place, it not appearing how that debt arose, pays it by drawing on a fund which he has in this country. And the Plaintiff may recover without interfering with any adjudged case, or any recognized principle.

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GIBBS, C. J. I think my Brother *Lens* has put this case on the true ground, and it is fit that the Court should not pass by the difficulties which he has attempted to throw in their way. He truly states, that it does not appear on the facts of this case, when the cambrics were remitted to this country, nor whether the Plaintiff was conscious of the consideration upon which these bills of exchange were accepted, it therefore must be taken that he knew only that, and all that, which these bills, on the face of them, communicate. The law laid down by the Defendant's counsel, that a trading with an enemy is illegal, my Brother *Lens* does not deny. The Defendant further contends, that if the subjects of another state are permitted in time of war to draw bills on this country, to get those bills accepted, and to negotiate them, and if the indorsee is permitted to recover on those bills, that is as direct a trading and communication with this country as possibly can be, and therefore is prohibited. Against this doctrine, it is urged, that this is not such a trading or communication as is prohibited ; and that it is so ruled by the case of *Antoine v. Morshead*. Whether in arguing that case the counsel for the Defendant urged that no contract could exist, I know not ; I believe he did ; but I know that that was the only consideration which made the Court hesitate on that case ; but they decided it on the ground that it was an excepted case, and did not come within the general rule. The bill was drawn by an *English* subject, on an *English* subject, and we thought that circumstance took it out of the ordinary rule. We adverted to the circumstance that the bill was indorsed to a foreigner, but it was not sued on until the time of peace. We also adverted to the principle which the Court of King's Bench adopted in *Kensington v. Inglis*, that that which was rendered lawful by the license, was lawful in all its consequences ; and as it was legal to carry goods from the island *A.* to the island *B.*, an insurance on those goods was also lawful. So we there held, that the end being legal, the means, without which it could not be effected, were also legal. [His Lordship here read the report of the judgement

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1817. . judgement in that case. (a)] We referred ourselves to the *legal* purpose for which those bills were drawn, and which was the support of our fellow-subjects in *France*. That case, therefore, *WILLISON* *v.* *PATTESON*. was decided as an exception to the general rule. By the general rule, I cannot help thinking that an alien enemy resident in *France*, has no right to draw on this country for a fund due to him, here; for that I take to be the very sort of communication which the policy of the law meant to prevent. It is impossible to say, that the Plaintiff was not conscious of the purpose for which these bills were drawn; for on the very day after the drawing, he attempts to take to himself by indorsement those funds; which is the very species of communication that it is the purpose of the law to prevent. I come very unwillingly to this conclusion, seeing nothing dishonest in the transaction.

DALLAS, J. *Potts v. Bell*, was not the first case that so decided. The law of *Potts v. Bell*, is admitted by the counsel for the Plaintiff, and in that decision I find no exception to the general rule, which is, that during war all contracts are at an end. I cannot say that the drawing a bill by an alien enemy is not a contract to pay by an alien enemy, or that when he indorses to an alien enemy, it is not a contract to pay to an alien enemy, and therefore I am most clearly of opinion, that the Plaintiff is not entitled to recover.

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PARK, J. Before the case of *Potts v. Bell*, there was an opinion prevalent in *Westminster Hall*, that the commerce with an enemy war not illegal. That decision, however, was founded on the opinions of all the best foreign jurists, particularly the admirable work of *Bynkershoek*. *Antoine v. Morshead* is distinguishable from this case, for the drawer and the payee were *British* prisoners of war, and I hope a *British* prisoner of war is not to be considered as an alien enemy. Lord *Eldon*, Chancellor, lays it down broadly, that every contract with an alien enemy is void. An attempt was made in the Court of King's Bench, in the case of *Roberts v. Hardy* (b), to extend the doctrine of *Macconnell v. Hector*, further than this Court intended. In *Macconnell v. Hector*, the Plaintiff was a trader resident in *France*: in *Roberts v. Hardy*, the party was a private *Englishman* who went to *America*, and was there detained as a prisoner, and the Court said, a prisoner of war is not to be prevented from drawing.

BURROUGH, J. The Court in *Hilary* term directed this to be

(a) *Ante*, VI. 239.

(b) 3 *Maule & Selw.* 532.

made a case, not from any doubt which they entertained, but from a wish that the cause should be decided in the presence of my Lord Chief Justice. In *Antoine v. Morshead*, the Court recognized the principle, in deciding that case as an exception to the rule. That cannot be done indirectly, which cannot be done directly. *Michelon*, having funds in this country, could not, during war, bring an action for money had and received against the holder of his funds here; neither can he, by drawing a bill on his debtor, and indorsing it to another, produce the same effect. The bill is a contract; and no contract can be enforced in a court of *British* judicature, which is made during the war, and which is made by an alien enemy. I am, therefore, clearly of opinion, that a nonsuit ought to be entered.

Lens then applied for permission that the case might be turned into a special verdict, but the Court said, they felt no difficulty whatever on the question, and did not think it necessary. The Plaintiff might resort to another remedy, if he had confidence in the point.

Rule absolute for nonsuit.

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EVERTH v. BELL.

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THIS was an action upon a policy of insurance upon the ship *Success*, declared to be upon fish, warranted, as usual, free from average, unless general, or the ship stranded. The Plaintiff in his first count averred that the ship by force of the winds and waves was stranded, bulged, damaged, and wrecked. The Defendant paid money, exceeding the premiums, into Court generally, upon the whole declaration. Upon the trial of the cause at *Guildhall*, at the sittings after *Hilary* term, 1817, before *Park, J.*, there was evidence of some general average: the Plaintiff went for a total * loss, and also for a partial loss, to entitle himself to

Though a Defendant, by payment into court, admits every cause of action stated, yet where the Plaintiff alleges in his declaration multifarious and inconsistent facts, as the grounds for one and the same claim, it is not competent for the Plaintiff

to apply the Defendant's payment into court of a sum insufficient to meet all the demands alleged, as evidence to prove such one of the Plaintiff's grounds of recovery as the Plaintiff may elect; but he must prove his case by other evidence of the fact.

The Plaintiff, on a policy on fish, free from average unless general, or the ship stranded, averred that the ship was stranded, bulged, damaged, and wrecked. The Defendant paid money into court generally. The Plaintiff offered the rule of Court for payment as evidence, 1. of a total loss, 2. of a stranding: Held that as the loss might, consistently with the declaration, accrue by other of the alleged causes than stranding, *e. g.* as a general average, the Plaintiff could not apply the payment into court as an admission of the total loss, or of the stranding.

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which last, he stated that the ship had been stranded, and for proof thereof, as well as of the total loss, he relied on the Defendant's rule to pay money into Court, because that was an admission of every cause of action stated in the declaration, and amongst others, as he urged, of a loss by stranding, and also of a total loss. The jury found that there was no total loss, nor any stranding in fact, and they found that there was no stranding unless the rule for payment of money into Court conclusively proved that the ship was stranded. A verdict passed for the Plaintiff, subject to the point reserved.

Lens, Serjt., in this term had obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Best and *Vaughan*, Serjts., showed cause. They urged that the Plaintiff had omitted to produce witnesses of the stranding, in consequence of being put off his guard by his confidence in the doctrine, which they still maintained to be correct, that the payment of money into Court admitted every cause of action stated in the declaration, although they allowed that it did not admit the amount of the damage. The payment into Court, therefore, admitted the cause of the loss, which was the stranding. It might be too much to say that it was an admission of every word in the declaration, in the different counts of which there might be some inconsistent averments, but a prominent part of this cause was a count peculiarly adapted to a loss by stranding.

The Court relieved *Lens* from supporting his rule.

[452] *GIBBS*, C. J. The Plaintiff's counsel have stated the law most correctly, that if this loss could proceed from any other cause than the stranding, the admission does not apply exclusively to the stranding; and unquestionably there may be a general average, or other causes of loss, and therefore the admission is not exclusively confined to the stranding, and the Court will not be extremely cautious strictly to tie down the parties to the effect of a payment into Court, when it is to prevent their trying their right.

The rest of the Court concurred in making the

Rule absolute for a nonsuit.

1817.

ABBOTT v. ABBOTT.

May 12.

BEST, Serjt., showed for cause against a rule which *Pell*, Serjt., had obtained, for judgement as in case of a nonsuit for not proceeding to trial pursuant to notice, that though the Defendant had obtained time to plead, on the terms of accepting short notice of trial for the sittings after term, yet that when the order was obtained, only one day remained before the sittings in *London*; and he was not required to accept notice of trial at the adjourned sittings, that not being within the meaning of the order.

Per Curiam. If an order for time to plead, upon the terms of taking short notice of trial for the sittings, be made at a period when only one day remains before the sittings, the party has a right to consider that he may discharge his mind from all possibility of going to trial at those sittings; and a notice for the adjourned sittings does not satisfy the terms of the order.

Rule discharged.

An undertaking to accept short notice of trial for the sittings after term, given when there is not time for short notice of trial at the sittings, does not compel the Defendant to accept short notice of trial at the adjourned sittings.

RAW v. ALDERSON.

[453]

May 12.

HULLOCK, Serjt., had on a former day obtained a rule *nisi* that the Plaintiff might be at liberty to enter up final judgement against the Defendant, as of this present term, for 240*l.* pursuant to a warrant of attorney which had been given to certain attorneys named, to "appear for us *William Alderson* and *George Alderson*, as of *Hilary* term last past, *Easter* term next, or any other subsequent term, to receive a declaration for me in an action of debt for 240*l.*, money borrowed, at the suit of *J. Raw*, and to confess the same action, or else to suffer a judgement by *nil dicit*, &c. for 240*l.* and costs. And we the said *W. A.* and *G. A.* authorize a release of errors." Executed by both. Given to secure 120*l.* on demand with interest. *William Alderson* (who, it was sworn, was a surety for *George*), was since dead.

If two warrant an attorney to confess judgement against them, and one dies, judgment cannot be entered up against the other.

Hullock, being called on to support his rule, admitted that where a joint warrant of attorney was given by two; it had been

1817. held that the Plaintiff cannot, after the death of one, pursue the authority against the other, as in *Gee v. Lane* (a). But in the case where each of the two has authorized a warrant to be entered against *me*, it had been held that where one of the two (which is this very case), who give the joint authority, dies, the action may nevertheless be proceeded in. *Gladwin v. Scott* (b). But to consider the case on a broader principle, all the authorities (and there are several which hold that where the warrant is given to confess judgement to two, it may be entered after the death of one) equally warrant the Plaintiff's position, that the authority survives, if it be to enter up judgement against *me* and another, and one dies. *Todd v. Dodd* (c). Warrant to confess judgement to two, one died before judgement, leave was given to enter up judgement against the other, for the Court held that a warrant of attorney of this sort cannot be so strictly construed as a bare authority at common law, because it is coupled with an interest, and was intended to be a security for money. *Sayer* (d) in his report of the same case differs, and is probably mistaken. *Futcher v. Smith* (e). Upon an authority to confess judgement to two, the Court gave leave to enter up judgement after the death of one, holding that the decease of one did not operate as a countermand of that authority. So in *Trendall v. May* (f), the Court of King's Bench held that the alteration in the state of parties being only in the persons charging, and not in the persons to be charged, might make a material distinction, and that they therefore were not embarrassed by the case of *Gee v. Lane*, and granted the permission. It must turn on a principle of law. Is this, which is in substance only a security for a debt, avoided by the decease of one of the debtors?

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GIBBS, C. J. The Court of King's Bench have determined that on a warrant to confess judgement given by two, the decease of one revokes the authority of the attorney. That Court has also decided, that on a warrant to confess judgement to two, the decease of one does not revoke the authority. They considered the distinction between the two cases, and decided that in the case of the decease of one Plaintiff the authority was not revoked. Unless I could see my way very clearly, I should not

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(a) 15 *East*, 592.(b) *Barnes*, 53.(c) 1 *Wils.* 312. S. C. *fusiis* by name of *Todd v. Todd*, *Barnes*, 48. S. C. *Sayer*, 5.(d) *Sayer*, 5.(e) 2 *W. Bl.* 1301.(f) 2 *Maule & Selw.* 76.

depart from the decision of the Court of King's Bench. I can see strong reasons for that judgement: for instance, if a judgement be entered against two, the one standing as a surety, he may have his remedy over: his condition may be materially altered after the decease of the other.

No one was instructed to show cause, but the Court, on their own examination of the case,

Discharged the rule.

ROBINSON v. YARROW.

1817.

RAW
v.
ALDERSON.

May 12.

ABRAHAM Henry had been a partner of *Charles Staeben*, under the firm of *Staeben and Co.*, but they had dissolved that partnership; after which *Henry* drew a bill on the Defendant at two months' date, payable to "our order," which he signed *P. pro C. Staeben and Co.*, *A. Henry*, and indorsed it to the Plaintiff in like manner, by the signature *P. pro Chas. Staeben and Co.*, *A. Henry*. The Defendant accepted the bill, and in this, which was an action against him for non-payment, the Plaintiff in his first count declared on the bill as drawn by *Abraham Henry*, using the name, style, and firm of *Chas. Staeben and Co.*, and averred an indorsement by *Henry*, not noticing therein that he indorsed by procuration. In the second count, the Plaintiff averred that the bill was drawn by *A. Henry*, and indorsed by *A. Henry*, not noticing the procuration. In a third count, the Plaintiff alleged that certain persons using the style of *Chas. Staeben and Co.* drew the bill, and that the said *Chas. Staeben and Co.* indorsed the bill. Upon the trial of the cause at *Guildhall*, at the sittings after *Hilary* term, 1817, before *Burrough, J.*, these facts were proved, except that no evidence was given of the hand-writing of the indorsement by *Henry*. Under the direction of *Burrough, J.*, a verdict passed for the Defendant.

The acceptance of a bill drawn by procuration admits the drawer's hand-writing, and the ratification to draw.

But though the bill is indorsed by the same procuration, the date thereof not appearing, the acceptance does not admit the procuration to indorse.

So though the indorsement were made before the acceptance. By *Park J.*

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Vaughan, Serjt., had obtained a rule *nisi* to set aside this verdict and have a new trial.

Best, Serjt., showed cause against the rule. He first contended that none of the counts truly described the bill. Next he objected that the Plaintiff had not proved the procuration of *Staeben and Co.* to have been given to *Henry* to indorse; so far

1817. from its being proved, there were strong indications that the name was fraudulently, if not feloniously, assumed by *Henry*. But though it has been held that an acceptance admits the drawer's hand-writing, and every thing else that is on the face of the bill, and must have been there when the drawee accepted, yet the acceptance does not admit those things which are on the back of the bill, and may or may not have been added after the acceptance.

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v.
YARROW.

Vaughan, in support of his rule. It is sufficient to describe the bill in the declaration either according to its legal effect or according to the tenor. *Bass v. Clive*(a). Therefore the third count is good, which states that certain persons using the firm of *Staeben* and Co. drew the bill, though only one person, *Henry*, in fact drew it. It is admitted that the acceptance proves the authority of *Henry* to use the name of *Staeben* and Co. to draw the bill. If the acceptance has proved that fact for one purpose, it has proved it for all the purposes of this bill. [457] If *Henry* was authorized to draw, it is not too much for a jury to infer that he had a continuing authority to indorse. *Bass v. Clive* goes further than this. Lord *Ellenborough*, C. J., says, "is not the acceptor, before he accepts a bill, bound to know whether the drawer is an aggregate firm or not?" The authority being proved to be once given, must be presumed to continue, unless the contrary be proved.

GIBBS, C. J. I cannot tell what private connexion may subsist between these parties. I can look only to the instrument itself, and the manner in which it is declared on. *Staeben* and Co. who were once a firm, purport to authorize *Henry* to draw on the Defendant. The Defendant accepts the bill, and thereby admits that *Staeben* and Co. are existing, as they may be, as to him: he stands answerable to *Staeben* and Co. for paying to them the amount of that bill; he admits that *Henry*, as the attorney of *Staeben* and Co., had authority to draw that bill; but it does not appear at what date the indorsement was made, and the Defendant has not admitted that *Henry* had a right to indorse that bill. The Defendant may say, I did suppose that *Staeben* and Co. were an existing house, as they once were, and that they had authorized *Henry* to draw that bill, and I have made myself liable to them; but I have not admitted that the agent was authorized to indorse the bill.

(a) 4 Maule & Selw. 13.

DALLAS, J. I am of the same opinion with respect to a conversation which was dwelt on in the argument: the Defendant admitted that he was liable to the person entitled to recover on that bill, but he did not say who that person was. The Plaintiff is not, therefore, entitled to recover.

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PARK, J. The mere acceptance proves the drawing, but it never proves the indorsement: it is not at all necessary that a power given to draw bills by procuration should enable the agent to indorse by procuration: the first is a power to get funds into the agent's hands, the other to pay them out. The case of *Smith v. Chester* (a) decides, that even if the indorsement be there, the acceptance does not admit the indorser's handwriting, and that the acceptor is bound to look only to the face of the bill. I therefore agree with my Lord and my Brother Dallas, that my Brother Burrough was right in directing this verdict.

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Rule discharged.

(a) 1 Term Rep. 654.

KERVAL v. WILLIAM FOSSETT and THOMAS FOSSETT.

May 13.

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BEST, Serjt., had on a former day obtained a rule nisi to set aside the proceedings in this cause for irregularity, and that an *exoneretur* might be entered on the bail piece, with costs. The facts were, that Mark Thomas and William Fossett having executed a bond to the Plaintiff for 2000*l.*, the Plaintiff commenced three actions of debt, one against Mark, and one against Thomas Fossett, whom respectively he arrested, and they severally gave bail in those actions: he also sued out a *capias* against William and Thomas Fossett, with an *ac etiam* against William, in prosecution of which writ the Plaintiff made an affidavit of debt against William only, and declared against William and Thomas separately. Upon this writ, the sheriff arrested both William and Thomas, and they had jointly put in bail.

The clause of *ac etiam* in bailable process points out the person against whom the action is to proceed.

Upon a bailable *capias* against two Defendants, with a clause of *ac etiam* against one, and affidavit of debt against one, the Plaintiff may regularly declare against that one only.

And though the sheriff arrest the other also, that does not alter the denomination of the action.

Copley, Serjt., showed cause against the rule. In the case of *Forbes v. Phillips* (a), inasmuch as the affidavit to hold to

(a) 2 New Rep. 98.

G G 2

bail

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bail was correct, being against *Phillips* only, the addition in the writ of *Francis Forbes*, it was held, did not vary the writ from the affidavit, any more than if *John Doe* were there. The Court cannot know whether *John Doe* be a real or a fictitious personage. This declaration is warranted most strictly by the writ, and the rule must be discharged. In *Moss v. Birch* (a) the *ac etiam* was against the two Defendants. But in the case of *Spencer v. Scott* (b), writ against two, and declaration against one, *Eyre*, C. J., said, if *John Doe* is ever named in the writ with the real Defendant, it follows that proceedings are not to be stayed because two names appear in the writ and one only in the declaration. *John Doe* is never inserted in the declaration. So in *Stables v. Ashley* (c), the Court said they would not distinguish between *John Doe* and a real Defendant. *Thompson and Another v. Cotter and Others*, acc. (d) In the present case, though there are two names in the common part of the writ, yet there is only one in the *ac etiam*; and the distinction is between this case and those where the *ac etiam* is against two, for it has been repeatedly decided that where the *ac etiam* is against two, a declaration against one is bad. *Lewin v. Smith*. (e) As to entering an *exoneretur* on the bail piece, the bail purport to be bail in an action against two, whereas this writ and this declaration are against one, therefore the bail is a nullity, and it is idle to enter an *exoneretur* where there is no bail piece and no bail in the action. Next the Defendant has applied too late, for no objection to the affidavit to hold to bail, or want of such affidavit, can be taken advantage of, after the bail are put in. *Dalton v. Barnes*. (f) *Shawman v. Whalley*. (g)

Best, in support of his rule. Motions on these subjects have often been made equally late. The bail are not to wait and see whether proceedings will be had against them. The case of *Forbes v. Phillips* and the other cases of that class are distinguishable. The Court there considered one of the Defendants, *Francis Forbes*, as a mere nominal person, like *John Doe*, and that the introduction of his name did not vitiate; but here the other Defendant is treated as an existing person, for he is actually arrested. If this affidavit be false, there can be no indictment for perjury. If the sheriff had been directed to take one, and he had taken the two, it would have been the sheriff's

(a) 5 Term Rep. 722.

(d) 1 Maule & Selw. 55.

(f) 1 Maule & Selw. 230.

(b) 1 Bos. & Pull. 19.

(e) 4 East, 589.

(g) Ante, VI. 185.

(c) 1 Bos. & Pull. 49.

fault; but this writ commands him to take the two: and if he had omitted it, or had let one of them escape, it would have been actionable. In the case of *Shawman v. Whalley*, it does not appear what the irregularity was; that might have been some little trifling mistake; but this affidavit is not an affidavit in this cause. In *Spencer v. Scott*, *Eyre, C. J.*, says, *John Doe* is never inserted in the declaration: where both are named in the writ, and *John Doe* is one, the Plaintiff may declare against one, but where both are real persons, the Plaintiff cannot declare against one. In *Stables v. Ashley* the distinction is taken between process bailable and not bailable. Therefore the Defendant is entitled to an *exoneretur*, and the declaration is irregular.

GIBBS, C. J., I am not able to see any ground on which these proceedings ought to be set aside. First, the Defendant will have much difficulty to get over the authority of *Shawman v. Whalley*, which is cited to show that the Defendant is too late in his application. The facts are, that a writ issues against three, on their joint and several bond, an affidavit of debt is made against each, in an action against each. In the beginning of the writ the Sheriff is commanded to take *William* and *Thomas*, and the *ac etiam* is against *William* alone. The Sheriff took *William*, and also took *Thomas*, whom he ought not to take; but he could not prejudice the Plaintiff by taking *Thomas*, whom he had no right to take. The question then is, whether he had a right to take *William*. It is objected by the counsel for the Defendant, that this was a writ against two, and that the Sheriff cannot take one, but must take the two; he is right in this conclusion, but the question is, whether this is a writ against two. In serviceable process, the Plaintiff may join in one writ as many Defendants as he will, and declare against one only. In bailable process, if a Plaintiff sues out a writ against two, he must declare against both. I think the *ac etiam* points out the person against whom the action is to proceed. *John Doe* is joined in every writ, and is not declared against; the Court cannot distinguish between *John Doe* and any other person. If it were necessary to join another in the declaration, because he is named in the introductory part of the writ, it must be necessary to put *John Doe* into every declaration on bailable process. I therefore think the rule ought to be discharged.

DALLAS, J. I am of the same opinion.

PARK, J. In *Moss v. Birch* the *ac etiam* was against both, and several declarations against each.

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BURROUGH, J. The only reason why two are usually inserted in writs, is, because the common printed form of the writ runs in the plural number, and unless there be a plurality of Defendants, the printed form does not grammatically apply to the case: but if the Plaintiff will strike out the plural words, and insert a singular number, he may sue one only.

Rule discharged.

May 16.

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SCHRODER and Another v. THOMPSON.

A vessel chartered to a port of *America* laden with salt, to bring home a return cargo of timber, entered the port during an embargo under which it was permitted her, upon the notification of the embargo, to return with the cargo on board, or to discharge her cargo, and return in ballast. She discharged her cargo, remained eighteen months there, till the embargo ceased, then shipped her homeward cargo, and was lost. Held that she was not bound, with relation to the underwriters on ship, to have returned with her cargo of salt, or to have sailed in ballast; and that the underwriters on ship were still liable.

THIS was an action upon a policy of insurance, at and from *London* to the ship's loading port or ports in *Virginia*, and back to *London*, with liberty to touch at *St. Ubes*; upon the ship *Bremer*. The cause was tried at *Guildhall* at the sittings after *Hilary* term 1817, before *Dallas, J.*, when it appeared that the owner of the vessel had chartered her to *Donaldson*, to proceed in ballast to *Norfolk* in *Virginia*, and there to load a cargo of timber, and therewith proceed to *London*, for the freight therein mentioned: sixty-five running days to be allowed for loading at *Norfolk* and unloading in *London*, and the days on demurrage over and above the said lading days at *5l. 5s., per day*: That on her way to *Virginia*, she should call at *St. Ubes*,* and there take a cargo of salt, with mats for dunnage, at the freight of *5d. per bushel* for the salt, to be paid on delivery at *Norfolk*. The ship sailed from *London* in ballast, arrived at *St. Ubes*, shipped a cargo of salt, and therewith arrived at the port of *Norfolk* in *Virginia* on 30th *January*, 1808. By an act of Congress, of 22d *December*, 1807, "an embargo was laid on all vessels in the ports and places within the limits and jurisdiction of the United States, cleared or not cleared, bound to any foreign port, and no clearance was to be furnished to any ship bound to any such foreign port, except vessels, under the immediate direction of the president of the United States. Provided that nothing in that act should be construed to prevent the departure of any foreign ship, either in ballast, or with the goods on board of such ship, when notified of that act. Armed vessels possessing commissions from any foreign power were not to be considered as liable to that embargo." The *Bremer* finished discharging her cargo on 27th *February*. She was not an *American* ship, nor belonged to any native

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native or any citizen of *America*, but was foreign to *America*, and the property of foreigners. Upon the ship's arrival, and during her stay in *Virginia*, the embargo enacted by that act was in force there. The embargo was taken off on 4th *March*, 1809, but the ship was restrained by the act of the government until 10th *June*, after which she took in a cargo, and on 13th *August* sailed for *London* with a cargo of timber, and was lost at sea. The defendants contended that the Plaintiff was not entitled to recover, first, because, when upon the ship's arrival at *Norfolk*, the embargo was found to subsist there, it was competent for her, being a ship foreign to *America*, either to have sailed in ballast after discharging her cargo of salt, or to have sailed with the cargo of salt, which she had on board when the embargo was first notified to her, either of which things she was permitted to do by the proviso in the first section of the act, but that it was not competent to the assured, in pursuit of their own purposes, voluntarily to submit themselves to the embargo, waiting for a cargo until that restriction should be taken off, and to subject the underwriters to a liability of an indefinite duration; secondly, that the vessel had staid an unreasonable time in the port of *Norfolk*, after the dissolution of the embargo. *Dallas*, J., inclined to think that the assured were bound to sail when they discovered the existence of the embargo, or if not, that at least the ship ought to have sailed in ballast as soon as she had discharged her cargo of salt, but he reserved both these points: if she were not bound to either of these acts, he thought there was nothing unreasonable in the length of time which she had taken to procure a cargo, after the restraint on her sailing was taken off. The jury found that there had been no unreasonable delay in the last mentioned particular, and, subject to the points reserved, they found a verdict for the Plaintiffs for a total loss.

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Lens, Serjt., in this term had obtained a rule *nisi* to set aside this verdict and enter a nonsuit.

Shepherd, Solicitor-General, and *Best*, Serjt., on a former day showed cause against this rule. They contended, first, that the proviso in the *American* embargo act, did not extend to foreign ships coming into the harbour during the embargo, but only to such as were in the harbours of *America* before the embargo took place, and merely permitted ships of the last description, instantly upon the embargo first taking place, to depart in the state in which they then were. But the construction of the act is immaterial, for whatever was the intention of the legislature, the master

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master of the vessel was entitled, with relation to the underwriters, so to conduct himself, notwithstanding the insurance, as his relations to his owners required him to conduct himself, in case the vessel had been uninsured. If he had returned in ballast, after discharging his cargo of salt, the embargo, which was not an hostile act, would have afforded no plea to an action by the freighters, for not bringing home a cargo of timber. The master, however, honestly thought that the *Americans* would not have permitted him to sail, and he continued in harbour under that supposed constraint, and in no instance has a delay under such a persuasion been treated as criminal.

Lens, and *Vaughan*, Serjts., in support of the rule, considered that the regulations of the statute extended as well to ships entering the *American* harbours during, as before the embargo. They contended, that though it might be a proper and judicious measure in a general view, that a ship sent in search of a cargo, and entering a port during an embargo, should wait in the port till it ceased, and should then take in her loading, as being the measure most beneficial to the owners of the outward and homeward-bound cargoes, yet that where there was, as here, an insurance on ship, the interests of the freighter and owner were not to be promoted at the expense of the underwriter on ship; and if the ship, being in ballast, might legally come out of the port, and go home in ballast, so far as it affects this insurance, she ought to have come out and gone home in ballast, notwithstanding that the charter party might require the contrary; and the homeward voyage would in that case have been protected by the policy. The ship was actually detained one year and a half, and, for aught that could be foreseen, she might have been detained many years. How long would the underwriters be liable under this embargo? Ten years? It makes the policy in effect a contract to insure a market, whereat the Plaintiff may load a homeward cargo. This therefore is an unjustifiable delay. The jury, in finding that there was no delay, only intended that there was no unnecessary delay between *March* and *August*, not that there was not a delay in remaining there during the embargo. The underwriters therefore are discharged.

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Cur. adv. vult.

GIBBS, C. J., now delivered the judgement.

The Court have looked very attentively into the facts of this case, and are of opinion, on due consideration of all the circumstances, that there is no ground to disturb this verdict: they think the

the ship was entitled to come home at the risk of the underwriter, and that at the time of the loss the ship was still protected by the insurance.

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Rule discharged.

MILLINGTON v. GOODMIN.

May 16.

HULLOCK, Serjt., after judgement by default, and a writ of error brought, and error assigned for want of an original, moved to amend the declaration of the Plaintiff below, by changing the venue from *Lancashire* to *Glocestershire*, into which county the original writ went. The writ of inquiry had been executed in *Lancashire*, and final judgement signed, and costs taxed.

GIBBS, C. J., This cannot be permitted after a writ of inquiry executed before the sheriff of *Lancaster*. The Plaintiff cannot get an original in *Lancaster*, because * there is no officer there to grant it. I fear the Plaintiff below has brought himself into this difficulty, suing out his original writ in *Glocestershire* and laying his venue in *Lancashire*, but I know of no remedy.

Where the venue is laid in a county palatine, and after writ of inquiry executed, and final judgement signed, a writ of error is brought, and error assigned for want of an original, the court will not amend the declaration by changing the venue.

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Rule refused.

MAGNAY v. GILKES.

May 16.

HEYWOOD, Serjt. moved that the rule for the discharge of this insolvent might be absolute in the first instance. The Defendant was indebted on a bail-bond in eleven pounds, it was certified by the gaoler that he had been twelve months and upwards imprisoned, and notice had been given to the Plaintiff of this application.

Upon application to discharge an insolvent debtor, the Court grants only a rule nisi in the first instance.

GIBBS, C. J. The act does not, I apprehend, make the gaoler's certificate, that the prisoner has been a twelvemonth in his custody, evidence of that fact; if it does not, I think it impossible that we can grant this application; for otherwise, we have nothing more than the affidavit of the party himself that he has been a twelvemonth in custody. Although we are informed that

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that in the first case which occurred after this act passed, the rule was made absolute in the first instance, yet in a subsequent case, *Ex parte Neilson (a)*, which passed on consideration, the Court held that the rule ought to be only a rule *nisi*.

The Court granted a rule to show cause, which, on a subsequent day, was made absolute.

(a) *Ante*, VI. 493.

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WILLIAMS v. MARSHALL.

May 16.

Under a license to export to a hostile country within a limited time, a ship clearing at the Custom-house in London on the day before the license expires, but delayed in the river by the breaking of a bowsprit, and consequently not obtaining her clearing note at Gravesend till two days after the expiration of the license, is not deemed to have exported within the time limited.

If a ship, licensed to export to an hostile country, do not sail within the time limited by the license, though she were delayed by an accident, she is not protected by the license.

Difference between a license to export and a license to import: the former, if the time elapses, must be renewed, because the

THIS case (a) was again tried at the sittings after Trinity term, 1816, before Gibbs, C. J., who, upon proof of the same facts, and no other excuse for not sailing sooner being proved, except that on the ship's passage down the river she broke her bowsprit, and lost a whole day in repairing it, but for which accident she might have reached Gravesend on the 10th of September, the day whereon the license expired, adhered to the judgement which the Court had in Michaelmas term, 1815, pronounced on the case: and clearly holding, that the passing the custom-house was no exportation, which point he had the authority of the late lamented Chief Baron Thomson for saying that the Court of Exchequer had expressly decided in the case of *The King v. Poughet (b)*, he nonsuited the Plaintiff.

Upon granting a rule *nisi*, for setting aside the nonsuit in the case of *Tulloch v. Boyd (c)*, the Court thought fit to open this case also, and granted a rule *nisi* for a new trial, to abide the event of the decision of the special verdict in that case, upon the single point whether the assured were still entitled, when he sailed, to the benefit of the license; but they refused to open the question, whether the ship's passing the custom-house in London were an exportation, declaring that question to be finally settled by their former decision * in this case, and by the case of the *Attorney-General v. Poughet*.

The cause was afterwards in this term spoken to by Shepherd, Solicitor-General (and Best, Serjt., was with him), for the Plaintiffs, and by Lens and Copley, Serjts. (and Vaughan, Serjt., was with them), for the Defendants.

For the Defendant it was argued, that the assured possessing the parties, being at home, can easily apply to renew.

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(a) Reported, *ante*, VI. 390.

(b) 2 Price, 381.

(c) See next case.

a license

a license which authorised him to sail within a certain limited time, and not sailing within the time, it was his own omission and his own fault that he has not procured another license. What he did at *Gravesend* was by no means immaterial, but was essential; the ship had not sailed, till she quitted *Gravesend*, and that was not till after the license had expired. It had been argued that the ship touched there for the clearance, merely for the sake of receiving the drawback: but whether she stopped there for that purpose, or for any other purpose, it was equally favourable to the Defendant. The question merely was, whether, because a trader had a license three days before, he therefore necessarily had a license three days after. The law of license had been relaxed to every extent which justice or utility required, but no reason required that it should be extended to this case. If a license being once given, no other license could ever be given, there might be more reason for unbounded indulgence, but here that reason exists not. It is equivalent to making a license mere waste paper, to say that, whether it has expired or not, if the ship sails near the time of the license expiring, it is sufficient. Upon that construction the grant of a license for any small time is equivalent to a grant of a license for a larger time, which it is not. The *Attorney-General v. Poughet* was not in point; it turned on the meaning of the word "export", where certain duties were concerned, and though it is in the Defendant's favour, as far as it goes, yet the Defendant did not rely on it. It was there held, that the ship had not exported, though she had departed from *London*. It decides, that an exporting has not taken place, until every thing is done, the want whereof can hinder a ship from going. That case was the converse of this: there the ship had every thing which was requisite, but had not moved from the port; here the ship had moved, but had not every thing requisite. The decision of the Court there is, that though the ship has all those things, she must actually move from her place: and the Court will decide here as they decided there. The argument in that case turned on the meaning of the word export. All the Court were unanimous that the hides were put on board for the purpose of exportation, but that they were not exported; and the officers of the crown held it so clear, that they refused their *fiat* for a writ of error. Under the present circumstances there is no ground why the time should be enlarged. It is not for the party to determine whether a new license shall be granted or not. There is no reason for referring this

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1817. this question to the party's own decision, when there is an opportunity of going to the privy council for another license.

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For the Plaintiff, it was argued, that there was a marked distinction between this case and *The Attorney-General v. Poughet*. The facts on which the Court of Exchequer gave judgement, were put on the record, and their judgement was and must have been confined to the questions which arose thereon. If those who drew that plea had ventured to state, that after the goods were entered and shipped, and before the day when the new duty was to attach, the ship had taken in all her cargo, and cleared at the custom-house at *London*, the Attorney-General would not have demurred, but taken issue on the question of fact, and let the law rise afterwards. That case, therefore, was not like this. Whether a writ of error should be granted, must depend, like the demurrer, on the facts stated on the record, which merely stated the putting of the goods on board to be exported at a future time: but in the present case every thing was done which was to be done by the ship before sailing. It is merely for security that the payment of the drawback is deferred till the cocket is given at *Gravesend*, but if a ship were to be lost between *London* and *Gravesend*, it does not therefore follow that she should not have the cocket. If the legislature had fixed *Sheerness* for the place of paying the drawback, it might with equal reason be said, that ships within the body of the counties of *Kent* and *Essex*, as they are, till they have cleared *Orfordness*, and the *Northforeland*, have not yet sailed. A vessel in ballast calls not at *Gravesend* for a cocket: nor, if the goods exported do not entitle the exporter to a drawback, need a laden vessel call for a cocket. In many cases of licenses to import, it has been held that the party is protected, though the ship do not arrive till long after the license has expired; nay, in some cases the protection has continued where the ship had never, as in *Effurth v. Smith* (a), begun her voyage till the whole time was expired. Here, if the ship had cleared and passed *Gravesend*, on the 9th, only three days earlier, she would have been in good time, within the decisions on the homeward licenses. She not only cleared the Custom-house on the 9th, but sailed from *London* on the 9th. In all cases of not importing within the time of the license, the party might get a renewal thereof.

GIBBS, C. J. The cases of outward and homeward li-

(a) *Ante*, V. 329,

censes are not at all alike. In the first place, the new license obtained here would not operate upon the acts *that pass in the interval between the expiration of the old license and the commencement of the new one. This difficulty did arise in one case. In the next place, the parties here cannot know what is passing in the minds of the navigators abroad, nor what the reasons were for their conduct.

Cur. adv. vult (a).

(a) For the judgement of the Court, see *post*, 475.

TULLOCH v. BOYD.

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THIS was an action upon a policy of insurance at and from London. Upon the trial of this cause at *Guildhall*, at the sittings after *Trinity* term, 1816, before *Gibbs*, C. J., it was proved that the Plaintiff had procured a license from the King in council, whereby, after reciting that the Plaintiff had represented on behalf of himself and other *British* merchants, that he had purchased two vessels for the purpose of trading between this kingdom and *Holland*, and prayed His Majesty's license for six months, permitting the said vessels, navigated in any manner, and sailing under any flag, to proceed from any port of *England* to any port on the coast of *Holland*, with indigo and other goods allowed by the order of council of 11th November, 1807, to be exported, with permission to cruise without molestation from one port of the coast of *Holland* to *another, and to load or land part of their cargoes at one or more places as might be most suitable; and having completed their inward cargoes, consisting of such goods as were allowed by that order to be imported, to proceed with the same to any port in *England*, the Crown granted permission to such two vessels, laden as aforesaid, to make one voyage and return to any port of this kingdom *North* of *Dover*, on condition that the names and tonnage of the vessels should be indorsed at the

A license to export must be more strictly conformed to than a license to import.

License for two vessels, navigated in any manner, and sailing under any flag, to proceed from *England* to *Holland* with specified goods, to cruise from one port of *Holland* to another, to land or load part of their cargoes at one or more places, as might be most suitable, and having completed their cargoes of specified goods, to proceed with the same to *England*; the license to be renewed on application by the parties at the

return from each voyage, during six months. The exporter, fearing the vigilance of the government in *Holland*, where his trade was contraband, delayed to export, until after the expiration of six months, and then sailed and was lost. Held, that the parties being in this country, and not applying for a renewed license, the adventure was not legalized by the original license; and an assurance thereon was void.

back

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back of that license at the time of clearance: that license to be renewed, on application by the parties at the return to this kingdom from each voyage during the term of six months from that date, 2d *July*, 1808. The Plaintiff's ship cleared outwards at the Custom-house on 19th *December*, 1807: he about that time received advices that the *douaniers* on the coast of *Holland* were very vigilant, and the state of things very bad abroad: the Plaintiff therefore detained the ship and cargo until 19th *January*, 1808, when the ship sailed, the license being then expired and not renewed. On the 20th *January*, she cleared at *Gravesend*, she sailed and was captured. *Gibbs*, C. J., thought, that in this case, where, the vessel having her papers on board, the assured had chosen to delay her on account of the danger which he apprehended, he was not entitled to the benefit of the expired license as if it were still existing; and here, inasmuch as the ship had not even sailed from *London* when the license expired, he thought it was a case clearly not within the protection of the license, and directed a nonsuit.

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Shepherd, Solicitor-General, in *Michaelmas* term last, moved for and obtained a rule *nisi* to set aside the nonsuit, and have a new trial. He cited *Effurth v. Smith* (a) and *Williams v. Marshall* (b). He contended that whether the circumstance that the ship had not performed her voyage within the time prescribed by the license, arose from her not having completed, or from her not having begun, her voyage within the time, made no difference in the principle: this doctrine had been recognized in *Williams v. Marshall*. And whether her delay was occasioned by an inevitable cause, or a justifiable cause, in all actions on policies was immaterial. *Driscoll v. Passmore* (c). There is no sound foundation for the distinction whether the ship be abroad or at home when the license expires. A *British* merchant has always the same opportunity to apply for a prolonged license to come home, as for a prolonged license to sail, but it has never yet been held necessary so to do. In *Effurth v. Smith* there was abundant time for such an application, and so is there in all cases where the license expires before the ship arrives. The Plaintiff, therefore, brings himself within the spirit of the same excuses for not literally observing the license, which have been there admitted. In the greater part of these

(a) *Ante*, V. 399.

(b) See the last case *ante*, 468. and also *ante*, VI. 290.

(c) 1 *Bos. & Pull*, 200.

cases the ship has been coming to *England*. In the case of the *Mars*, in the Court of Admiralty, not reported, it is said that the ship had not sailed when the license expired, yet the Court of Admiralty ordered restitution of the ship and cargo.

The Court expressed a desire that the circumstances of that case should be ascertained and fully stated: without that authority there was nothing but the strong desire they felt to protect an insurance effected without fraud, which could make them hesitate a moment in refusing this application. They granted a rule *nisi* upon the terms that the case should be made a special verdict.

Lens and Best, Serjts., on a former day in this term, showed cause against this rule. This case is one where the merchant detains the ship upon his own discretion and views of convenience, constituting himself the sole judge whether the license shall last longer. One of the reasons for the delay, proved at the trial, was, that it was prudent to have dark weather for this, which, as to the enemy, was a contraband voyage; so that the assured foresaw, for weeks beforehand, whether he should want a renewal of the license. And, by a clause in the license, the license is to be renewed after every trip, though it gives six months' time to make one voyage. This is not merely a private case: it is a general concern to preserve our shipping; and though the owner may choose to risk his ship on an enemy's coast in light nights, yet the government is interested in preventing the loss, and chooses to exercise a check. The case of *The Attorney-General v. Poughet* (a) does recognize a principle which applies here, but, independently of that authority, this is a much stronger case than *Williams v. Marshall*, and the assured cannot take a month after the expiration of the license before he makes his voyage.

Shepherd, Solicitor-General (and *Vaughan*, Serjt., was with him), endeavoured to support the rule. The clause for renewal of the license before a second voyage makes no difference in the liberal construction which ought to prevail as to the first voyage. It is agreed that a party cannot unreasonably and capriciously extend his license to any other time.

Cur. adv. vult.

(a) Since reported, 2 Price, 381.

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[476] GIBBS, C. J., now delivered the decision of the Court. In the former of these cases it is unnecessary to give judgement, for we already have given it; but in the case of *Tulloch v. Boyd*, we were informed, that the very learned Judge who presides in the Court of Admiralty, had just then decided the reverse in that Court. We therefore opened the rules in both these causes, for further argument: no such case, however, has been presented to us, and there is no reason to desert our former judgement; and the rule in both cases must be

Discharged.

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LINGHAM v. LANGHORN.

If a Defendant, moving for judgement as in case of a nonsuit for not proceeding to trial, omits to obtain, in the disposal of that rule, his costs for not proceeding to trial, he cannot after that rule is discharged obtain a separate rule for those costs.

BEST, Serjt., moved to set aside a rule which had been obtained for costs for not proceeding to trial pursuant to notice: his ground was, that the Defendant had, before moving for that rule, moved for judgement as in the case of a nonsuit.

Vaughan, Serjt., now showed cause. The Plaintiff was under terms three times peremptorily to try his cause. In *Jordaine v. Sharp* (a) it was held, that the right to costs for not proceeding to trial, and the right to judgement as in case of a nonsuit, may be discussed together, but no doubt is there expressed that either motion might be made separately. It was hard, that when the Court, upon the Defendant's former motion for judgement as in case of a nonsuit, thought fit to extend to the Plaintiff a third indulgence, on a peremptory undertaking to try, on payment of costs, as a condition precedent, under which the Defendant had received the costs of that application, he should not also receive his costs of not proceeding to trial.

[477] *Best*, Serjt., in support of his rule, urged that on the discharge of the former rule the Plaintiff had already paid the Defendant the costs which he then asked for, and which were

then taxed by the prothonotary. Either upon that occasion the Defendant asked for the costs of not proceeding to trial, and the Court under the circumstances refused them, or, if he did not ask for them, it was strong evidence that he had no right to them; but after all the costs which the Defendant's rule asked had been taxed and paid, the Defendant ought not, behind the Plaintiff's back, irregularly to draw up a side-bar rule for costs for not proceeding to trial pursuant to notice.

GIBBS, C. J. The Defendant having obtained a rule for costs for not proceeding to trial pursuant to notice, the Plaintiff applies to set this rule aside, as contrary to the practice. In the case of *Clarke v. Simpson (a)*, this subject was fully considered. The doctrine therein laid down by the Court certainly goes to this, that a Defendant cannot move for costs for not proceeding to trial, after moving for judgement as in the case of a nonsuit. By the practice of the Court, therefore, the Defendant might apply either for the costs of not proceeding to trial, or for judgement as in the case of a nonsuit. Whichever way the latter rule is disposed of, it includes the consideration of the costs of not proceeding to trial. It has happened that by the fault of some one, perhaps of the Court (*b*), the Defendant has not had the full justice to which he was entitled; but he had no right to draw up this side-bar rule without notice. But notwithstanding that costs usually abide the event of motions for irregularity, yet in this peculiar case I think that though the Plaintiff's rule ought to be absolute, it ought so to be without costs.

Rule absolute.

(a) *Ante*, IV. 591.

(b) It is conceived there was no omission on the part of the Court, which does not usually express its judgement on this part of the rule; nor is it requisite, for it is a point of practice familiar to the officer, on which he acts, without any particular direction; it is only necessary that the attorney should take care to have the rule properly drawn up, and to that end, should bring before the officer the facts of his having incurred costs of preparing for trial.

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PEELE and Others, Assignees of WADDINGTON, a Bankrupt,
v. NORTHCOTE.

Where a broker, indebted for premiums of insurance on policies subscribed by an underwriter who had since become bankrupt, had a *del credere* commission on one of the policies, effected in the name, not of the broker, but of the assured, and expressed in the body thereof, whereon a loss happened before the bankruptcy, the broker not being entrusted with the custody of the policy; though the broker paid the loss to the assured before the commission, Held that he could not set off that loss against the premiums due to the assignees of the bankrupt.

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THIS was an action of *indebitatus assumpsit*, brought to recover divers premiums of policies of insurance subscribed and caused to be subscribed by *Waddington*, a bankrupt, before his bankruptcy, for the Defendants. The Defendants gave notice of a set-off. The cause was tried at *Guildhall*, at the sittings after *Trinity* term, 1816, before *Gibbs*, C. J. It was admitted that *Waddington*, who was declared a bankrupt under a commission dated 25th March, 1815, had before his bankruptcy underwritten policies for the Defendants, who acted as well in the character of insurance brokers, as effected policies on property of their own; and the Defendants were indebted to him at the time of his bankruptcy in 21*l.* for premiums, and he was indebted to them in returns of premiums before then allowed on several policies, in 81*l.* 9*s.* 2*d.* One of the policies was effected on 7th November, 1814, by the Defendants as the brokers for *Brown, Weston, and Co.*, and the bankrupt, by *Mounsher*, his agent, subscribed it for 200*l.* The policy expressed that *Brown, Weston, and Co.** for themselves and as agents, as well in their own name, as in the name and names of all and every other person, to whom the same did, might, or should appertain, effected that insurance from *Stockholm* to *Pernambuco*, on the *Prince Oscar*, with liberty to touch and stay at any ports whatever; next after which passage followed a declaration that "it was agreed that the broker should guarantee the underwriters thereon, without prejudice to that insurance." The goods insured by that policy were shipped on board the *Prince Oscar*, and *Brown, Weston, and Co.* were interested therein to the full amount of the money insured thereon. A loss of 97*l.* 3*s.* 3*d.* *per cent.* on those goods happened on 28th February, 1815, which had been adjusted by all the underwriters with the exception of the bankrupt, by whom it had not been adjusted, further than by the following memorandum indorsed on the policy, by *Mounsher*; as his agent, subsequent to the bankruptcy, viz. "Admit to prove 194*l.* 6*s.* 6*d.* under the estate of *H. Waddington, W. Mounsher.*" It was proved that the Defendants had in *August* and *September* preceding paid *Brown* and *Weston* very considerable sums, including the loss in question. It was proved that the policy (which was not

not effected in the name of the broker) remained in the hands of the assured; and the Defendants never had the custody of it until the assured called for and received the loss from the Defendant; and upon enforcing the contract of guaranty against him, they sent him the policy. Under these circumstances the Plaintiff insisted that the Defendant was not entitled to set off this loss against the premiums due. *Gibbs, C. J.*, thought that the Defendant shewed no pretence to entitle him to a set-off, except his commission *del credere*, which he thought was not attended with that effect, but he reserved that point, subject where- to the jury found a verdict for the Plaintiff for 134*l.* 10*s.* 10*d.*

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Vaughan, Serjt., in *Michaelmas* term, 1816, obtained a rule *nisi* to set aside the verdict and enter a nonsuit. He cited *Grove v. Dubois* (a), *Bize v. Dickason* (b), and *Wienholt v. Roberts* (c), wherein Lord *Ellenborough, C. J.*, is reported to have said, that a "broker with a *del credere* commission may be looked upon as the owner of the policy; and he being answerable to the insured for the loss, the amount may be considered as due to him, and may be set off in an action brought against him by the underwriter for premiums." He also moved this as a case of mutual credit.

GIBBS, C. J. I have heard Lord *Ellenborough*, over and over again, state (d), that he never could conceive how a contract by broker, that an assurer should fulfil his agreement, could make any difference in the contract between the assurer and the assured. The Defendant is completely shut out from taking the ground of mutual credit by his own statement. The policy is not effected in the name of the broker, nor left in his custody.

Rule *nisi*.

(a) 1 *Term Rep.* 112. In *Grove v. Dubois*, *Buller, J.*, is made to say, "I remember many actions brought at *Guildhall* against brokers with commissions *del credere*, and I never heard any inquiry made, in such cases, whether there had been a previous demand and refusal; and I can venture to say that such is not the practice."

Has it ever occurred to any lawyer of the deepest learning, or most extensive experience at *Guildhall*, of the present

day, to have known such an action tried, or to have ever seen such a declaration? (and the action must surely be a special action)? It would be important to know, whether the declaration does not aver that the principal has refused to pay. Must not the right to recover against the broker exist only in failure of the underwriter's paying? Nobody has ever been able to find out any instances of the practice above stated.

(b) *Ibid.* 285.

(c) 2 *Campb.* 586.

(d) He is so reported in *Cumming v. Forrester*, 1 *Maule & Selw.* 494. and *Koster v. Eson*, 2 *Maule & Selw.* 112. See 1 *Park, Ins.* 7th edit. 41.

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Lens, Serjt., now showed cause against this rule. The Defendants' guaranty does not so make the Defendants parties to the contract, that they can set off. As brokers after they have once effected the policy, their duty is at an end, they have nothing further to do with the policy, or the loss. This guaranty creates no relation between the broker and the underwriters, it merely gives the assured a right to call on the broker to make good that loss which the underwriter is unable to satisfy. It is a collateral agreement; and though between the underwriter and assured, it is not to avoid the insurance, yet it forms no contract between the underwriter and the assured. When a policy is left with a broker with consent of all parties, that he may receive such losses as happen, it gives him a lien on the policy, and in case of a bankruptcy may constitute an item of mutual credit, but this case is stripped of all circumstances except the relative situation of the different parties: the mere appearance of a guaranty is not sufficient to enable the assured at once to resort to the broker. It is immaterial that the adjustment was since the bankruptcy. The loss was before the bankruptcy. The Plaintiff does not contend that the mere adjustment would alter the right, neither is the express date of the act of bankruptcy material. Various cases are on this question collected in the system of the law of marine insurances (a). They all show that it is necessary, in some shape or other, either by showing that the broker is the person interested, or that the policy is underwritten in his name, to connect him with the party. Against the payment of the premium, he has in the character of agent nothing either to set-off or deduct; as to the purposes of the policy he continues a mere agent throughout. The opinion in *Grove v. Dubois*, that a commission *del credere* makes a right of set-off, has been overruled. Nothing here gives the Defendant a right to account with the underwriter. The underwriter, indeed, is liable to the loss: the expression of the commission *del credere* on the face of the policy, is a circumstance wholly irrelevant, it is a mere recital of the fact. In *Cumming v. Forrester* (b), Lord *Ellenborough* observes very strongly on the doctrine: that case was like this, yet it was held that the commission *del credere* would not enable the broker to introduce the loss into his accounts. This is a case of the bare employment of the broker as agent to effect a policy, under which circumstances, the cases of *Shee v. Clarkson* (c), *Minet v.*

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(a) 1 *Park*, 7th edit. 39 to 42.

(c) 12 *East*, 507.

(b) 1 *Maule & Selw.* 494. S. C. *Park*, 7th edit. 41.

Forrester (a), *Goldschmidt v. Lyon (b)*, *Parker, Assignee of Parker, v. Smith (c)*, and *Cumming v. Forrester*, all show that there is no privity in that which relates to the loss.

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Shepherd, Solicitor-General, and *Vaughan*, *contrâ*. The Defendant has a right to bring this sum into the account. They admitted that a distinction had been taken between policies effected in the name of the assured, and in the name of the broker. Here, though the insurance is in the name of the assured, not of the broker, yet there was either a debt or a mutual credit. It materially differs the case, that the policy itself contains this clause, that the broker may guarantee the payment of the losses with the consent of the underwriters. Admitting that a broker who should voluntarily pay a loss for an underwriter would have no claim to set it off, yet here, where it is done with such an assent as amounts to an authority, he can. This is an irrevocable authority, given on the face of the policy, to pay the loss, and therefore at the time of the bankruptcy it constitutes a mutual credit; and if it does, it signifies not whether the payment were before or after the bankruptcy: in the one case it would be a mutual debt, in the other, it would be a mutual credit, which afterwards ripens into a debt. It is an advantage to the underwriter, that the guaranty is expressed on the face of the policy, for probably without the guaranty the assured would not have accepted his subscription: this advantage is therefore a valuable consideration for a promise by the underwriter that the broker should be at liberty to set off losses against the premiums; and a promise and authority given for a valuable consideration, are coupled with an interest, and therefore they cannot be revoked either by the underwriter before his bankruptcy, nor are they revoked by the bankruptcy, as a mere naked authority is. The words "without prejudice to this insurance" are part of the original printed form, and have nothing to do with the sentence which contains the contract of guaranty. The cases of *Grove v. Dubois* and *Bize v. Dickason* have put it on this ground of the commission *del credere*; and *Buller, J.*, says "there are repeated instances of actions brought at *Guildhall*, against brokers with commissions *del credere*, and he had never heard any inquiry made in such cases, whether there had been a previous demand and refusal; and he could venture to say, such was not the practice." The effect of this authority is, that the underwriter au-

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(a) *Ante*, IV. 541, n.(b) *Ante*, IV. 534.(c) 16 *East*. 382.

thorizes

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thorizes the broker to pay this loss to the assured whenever a loss shall happen. *Cumming v. Forrester* is, all except the *dictum* of Lord *Ellenborough*, irrelevant, and that *dictum* is favourable to the Defendant; for Lord *Ellenborough* speaks of an authorized contract between two others: this is an authorized contract. There is a distinction between privy and party: the broker is privy, the underwriter and the assured are parties. Here is a privity of contract: before the bankruptcy, a loss takes place, the effect whereof is to create a debt between the broker and the assured; for though the broker is answerable only in the second instance, yet with this assent the assured can resort to him in the first instance, before he has applied to the principal. *Grove v. Dubois* and *Bize v. Dickason* go to that extent. In *Wincholt v. Roberts*, Lord *Ellenborough* recognizes the same doctrine. Under these circumstances, this is clearly a mutual credit, and is a defence.

Lens replied, on *Wincholt v. Roberts*, that the expression in the report, that the broker had underwritten a policy to the Defendant, rendered the sense doubtful, whether the broker himself was not party to the policy, and so that case came within the other class of cases; and Lord *Ellenborough's* proposition there, "that a broker with a *del credere* commission may be looked upon as the owner of the policy", must be understood as said of that particular case where the broker had insured in his own name, otherwise it cuts up by the roots the doctrine of *Cumming v. Forrester*; and all these other similar cases.

Cur. adv. vult.

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GIBBS, C. J., now delivered the judgement of the Court. This is a question whether a broker had a right to set off a loss against premiums of insurance due to the assignees of a bankrupt upon policies subscribed by him before his bankruptcy. The facts were, that the broker was to guarantee all the underwriters for a *del credere* commission, and was therefore, it is quite clear, liable only in the second instance to make good the loss in case a loss should arise. Before the bankruptcy of the assured, the broker was called on to pay the loss to him, and did pay it; and the question is, whether this be either a mutual debt existing at the time of the bankruptcy, or a mutual credit. That it was not a mutual debt, is clear from this circumstance; it had not been paid before the bankruptcy. The only question, therefore, is, whether it was a mutual credit. If this policy had been effected in the name of the broker, it might have ranged itself under a class

class of cases which have been decided, whether rightly or not, I do not now say: if it had been left in the hands of the broker, it would have ranged itself under another class of decided cases. But the broker pays this loss simply on his commission *del credere*; and, leaving the case there, we think it quite clear, that it is neither a mutual debt, nor a mutual credit. But what is supposed to distinguish this case from all others, is, that the underwriters are parties to the agreement by which the broker guarantees to the assured the solvency of the underwriters. That is a trust, it is argued, given to the broker; and that if the broker pays, he has his action on the agreement of the underwriter, to recover back that sum from him. That question depends on the construction of this instrument. The broker is agent for both parties to certain purposes, but with respect to guaranteeing the underwriters, no one is interested in that but the assured, who pays him, for so doing, his commission *del credere*. The broker does hand over to the assured a policy containing a memorandum that the broker will guarantee the underwriters, but no one is interested therein except the assured, and the instrument is only to be considered as evidence of an agreement between the broker and the assured, and the case stands on the common circumstance of money paid by a broker to the assured, under a commission *del credere*, and under those circumstances we think the broker is not entitled to set off these premiums against the losses due from the underwriter; the rule therefore must be

Discharged..

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THE Plaintiff declared in debt for two years' rent, 231*l.* due 25th Dec., 1815. Pending that action, the Defendant tendered 86*l.* rent. The residue had been paid by his assignee of the lease. The Plaintiff discontinued that suit, and commenced the present action, which was covenant, for the same rent. The Defendant, as to 145*l.*, parcel, pleaded payment, and as to 86*l.*, residue, he pleaded that the Plaintiff ought not to recover any damages, by reason of the non-payment thereof, because the Defendant, from the time when it became due, hitherto, had been, and still was, ready to pay; and that on a certain day after it be-

Upon a bare covenant for the payment of money, the Defendant may plead a tender.

Whether on a plea of tender, the Defendant's perpetual readiness to pay be traversable.

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came due, and before the commencement of this suit, to wit, 12th *June*, 1816, he tendered that sum. The Plaintiff replied, that the Defendant had not always from the time when that sum became due, been ready to pay; but that, on the contrary, after the time when the money became due, to wit, on 20th *January*, 1816, he, the Plaintiff (not saying whether after the tender, or before the tender), demanded payment, and the Defendant refused. The Defendant rejoined that that sum was not demanded by the Plaintiff in manner alleged. The Defendant joined issue thereon (a). The cause was tried at the sittings after *Trinity* term, 1816, before *Gibbs*, C. J., when the Plaintiff produced no proof of a demand, except the two actions; the one or the other of which, he contended, amounted to a demand subsequent to the tender; but the learned Judge who tried the cause, held that neither of them constituted a subsequent demand, and directed the jury to find that issue for the Defendant.

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Vaughan, Serjt., in *Michaelmas* term, obtained a rule *nisi* to set aside the verdict and have a new trial, and was, with *Best*, Serjt., now called upon to support the rule.

The Court, not dwelling on the peculiarity of this plea, which parried the allegation of tender, and proffered an issue on the continual readiness, expressed a clear opinion, that taking whichever of the actions the Defendant pleased, he could not establish the fact of a demand subsequent to the tender; for the first action was previous to the tender, and the second was the cause in judgement. Whereupon the Defendant's counsel contended only that a plea of tender after the day, in covenant for the payment of money, was bad. It was like the case of a bill of exchange, in which a tender was no plea. *Hume v. Peploe* (b). So, on a bond payable at a certain day, a tender after the day, at common law, is bad. *Giles v. Harris* (c). So, if he covenants to pay on a given day, he cannot plead a tender after default made to pay at that day. The averment could not be true, that the Defendant had, ever since the debt accrued, been ready to pay, for otherwise he would not have suffered an action of debt to be brought against him.

GIBBS, C. J. I should be sorry that it should be doubted for a moment, that where there is a mere dry covenant for payment of money, it may not be tendered. Suppose a covenant for rent,

(a) On the validity of this plea, see 1 *Wms. Saund.* 33. a note. (b) 8 *East*, 168.

(c) *Giles v. Harris*, 1 *Lord Raym.* 254. S. C. by name of *Giles v. Hart*, 2 *Salk.* 622. *Comb.* 443. *Carth.* 413. *Holt*, 556. 12 *Mod.* 152. 3 *Salk.* 343.

and three or four quarters due, it might always be said, that an action had accrued.

BURROUGH, J. A tender always admits the cause of action; it only goes in bar of damages.

Rule discharged.

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THE Defendant, who was a minor, and was sued as administratrix, had appeared in this action by attorney, and *Best*, Serjt., for the Plaintiff, had obtained a rule *nisi* to set aside that appearance, and that the Defendant should name a guardian, and appear by such guardian.

If a minor Defendant appears by attorney, the Court will, at the instance of the Plaintiff, compel an amendment of the appearance by substituting a guardian.

Pell, Serjt., showed cause against this rule, upon an affidavit that the letters of administration were revoked, in consequence of the discovery of the Defendant's infancy, which, until lately, had not been known to her attorney; and that administration *durante minori ætate* had since been granted to another. It was therefore unnecessary that the Defendant should appoint a guardian to defend a suit to which the Defendant was no longer liable.

Best, in support of his rule, urged, that the Defendant was administratrix when the suit was commenced, and he was therefore entitled to the rule.

Per Curiam. The Defendant must appear as she ought to have done, by guardian, but she is to be at liberty to plead *de novo*.

Rule absolute.

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The Defendant was owner and occupier of a wood adjoining a wood of B., divided therefrom by a low bank and a shallow ditch, not being a sufficient fence to prevent dogs from passing from B.'s wood into the Defendant's wood.

There were public footpaths through the Defendant's wood, not fenced off therefrom.

The Defendant, to preserve hares in his wood, and to prevent them from being killed therein by dogs and foxes that came thereinto in pursuit of hares, kept iron spikes screwed and fastened into several trees in his wood, each spike having two sharp ends, and so placed that each end should point along the course of a hare-path, and purposely

placed at such a height from the ground, as to allow a hare to pass under them without injury, but to wound and kill a dog, that might happen to run against one of the sharp ends thereof, the spikes being, from their nature and positions, adapted to effect the purpose for which the Defendant fastened them there: none of them was at a less distance than 50 yards from any footpath, and some were from 150 to 160 yards distant therefrom. The Defendant kept notices painted on boards placed at the outsides of some parts of the wood, that steel-traps, spring-guns, and dog-spikes were set in that wood for vermin. The Plaintiff, with B.'s permission, was sporting in his wood, with a valuable pointer; a hare rose in his wood, and was pursued by the dog thereout, over the bank and ditch, into the Defendant's wood, and in the pursuit, there ran against one of the sharp spikes, and was killed. The Plaintiff endeavoured as much as in him lay to prevent his dog from pursuing the hare into the Defendant's wood, but was unable so to do. The Plaintiff having brought an action upon the case against the Defendant to recover a compensation for the loss of his dog, the Court of Common Pleas were equally divided in opinion whether the action were maintainable, *Gibbs, C. J.*, and *Dallas, J.*, holding that it was not, and *Park and Burrough, Js.*, holding that the Plaintiff was entitled to recover.

One who finds game on his own ground, cannot justify pursuing it into the land of another.

and

THE Plaintiff, in *Hilary* term, 54th *Geo. 3.* declared in this court in case, for that whereas, before and at the time of the committing the grievance by the Defendant, as hereinafter mentioned, the Plaintiff was going and passing in, upon, and over a certain wood, or parcel of land, adjoining a certain other wood, or parcel of land, of the Defendant, and separated and divided therefrom by a certain mound or bank of earth, in the parish of *Lewkner*, county *Oxford*, with a certain dog of the Plaintiff of great value (to wit), of the value of 50*l.*, and he the Plaintiff so going and passing in, upon, and over the first-mentioned wood, piece, or parcel of land, with his dog as aforesaid, afterwards, and before the time of the committing of the grievance, *a hare started and jumped up in the first-mentioned wood or parcel of land, in the sight and view of the Plaintiff's dog, and the hare then and there ran in and along the same wood, or parcel of land, over the said mound or bank of earth separating and dividing the same wood from the Defendant's wood, or parcel of land, and unto and into the Defendant's wood, in and along a certain hare-path in the same, and the Plaintiff's dog then and there immediately followed and ran after the hare, in and along the first-mentioned wood, over the mound or bank of earth, and then and there, against the will and inclination of the Plaintiff, ran unto, and into the Defendant's wood, in and along the said hare-path in the Defendant's wood, in pursuit of the hare, yet the Defendant, wrongfully, injuriously, and maliciously, and intending to injure, prejudice, and aggrieve the Plaintiff in this behalf, and to wound, kill, and destroy his dog, and wholly to deprive him of the same, wrongfully and injuriously put, placed, drove,

and fixed, and caused and procured to be put, placed, driven, and fixed unto, and into divers trees, and pieces of wood, standing and being in, upon, and near to divers parts of the said hare-path and other hare-paths in the Defendant's wood, divers nails, spikes, and iron instruments of great length, to wit of the length of two feet respectively, and for the purpose, and with the intent to kill, wound, and destroy any dog or dogs, running in and along the said hare-paths, or either of them, by means whereof the Plaintiff's dog in following, pursuing, and running after the said hare, in and along the said hare-path in the Defendant's wood, necessarily and unavoidably, and with great force and violence, ran and was forced upon and against the said nails, spikes, and iron instruments; and thereby the dog then and there became and was greatly lacerated, wounded, and injured, and thereby the Plaintiff's dog, being of the value aforesaid, afterwards died, and became and was wholly lost to the Plaintiff. There were other counts, which it is not material to state. The Defendant pleaded not guilty.

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This cause was tried at the *Oxford* spring assizes, 1814, before *Dallas, J.*, when a verdict passed for the Plaintiff, damages 15*l.*, subject to a point which the learned Judge, on the authority of *Townsend v. Wathen (a)*, reserved, whether the action would lie.

Accordingly *Shepherd*, Solicitor-General, in *Easter* term, 1814, obtained a rule *nisi* to set aside the verdict, and have a new trial.

In *Michaelmas* term, 1815, *Vaughan*, Serjt., with whom *Best* also was of counsel, showed cause, citing 2 *Ro. Ab.* 566. *Tresspass, K. pl. 1. Co. Dig. Pleader, 3. M. 31. Mitten v. Fawdrye, Poph. 161. S. C. W. Jo. 131. by name of Millen v. Fawtrej; S. C. Latch. 13. by name of Millen v. Hawery, and 119. by name of Millen v. Fawdry. Beckwith v. Shordike and Another, 4 Burr. 2092. Dymock v. Allanby, Lincoln Spring assizes, 1809 or 1810, cor. Bayley, J., Vere v. Lord Cawdor, 11 East, 568. Wright v. Ramscott, 1 Saund. 84. S. C. 1 Siderf. 336. Churchward v. Studdy, 14 East, 249. Sutton v. Moody, 1 *Ld. Ray.* 250. S. C. 2 *Salk.* 556. 12 *H. 8. fol. 9. Reynell v. Champnoon, Cro. Car. 228. Corner v. Champness, Taunton Spring assizes, 1814, cor. Dampier, J., Townsend v. Wathen, ubi supra. 2 Ro. Ab. 548. pl. 5. The King v. The Bishop of Bangor, cor. Heath, J.**

Lens, Serjt., in the same term, with whom *Shepherd*, Solicitor-

(a) 9 *East*, 277.

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General, was also of counsel, was heard in support of the rule.

*In the course of his argument he cited *Brock v. Copeland*, 1 *Esp.* 203. *Stat.* 21. *Jas.* 1. c. 16. s. 5. *Barrington v. Turner*, 3 *Lev.* 28. *Sutton v. Moody*, 1 *Com.* 34.

The Court took time to consider; and in the same term, they directed that the case should be turned into a special verdict, and that it should be again spoken to (a).

Consequently, in *Easter* term, 1816, the special verdict, being drawn up, was argued by *Best*, Serjt., for the Plaintiff, and *Bosanquet*, Serjt., for the Defendant.

Best cited, in addition to the authorities referred to on the former occasion, 4 *Co.* 38. *b. Tyrriugham's case*, 5th res., *Anonymous*, cor. *Mansfield*, C. J. *Guildhall*, case against the owner of an ox, which was driven from *Essex* to *London* for sale; it was tranquil when it left home, but being fevered by the journey, it gored the Plaintiff in *Whitechapel*, and Held, the action lay not.

Bosanquet cited, in addition to the former cases, *Wadhurst v. Damme*, *Cro. Jac.* 44. *Butterfield v. Forrester*, 11 *East*, 60. *Blithe v. Topham*, *Cro. Jac.* 158. 9. S. C. 1 *Ro. Ab.* 88. pl. 4. line 30. *Bro. Abr. Trespass*, pl. 345. 2 *Ro. Abr.* 565. *Trespass. Justification*. I. pl. 7. *Ibid.* 568. *Trespass excusable*, N. pl. 2. *Foster*, 262. 3. 4 *Bl. Com.* 192. *Kel.* 40. 3 *Inst.* 57 (b).

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The special verdict stated, that before and at the time in the declaration mentioned, the Defendant was the owner and occupier of certain woodlands situate in the parish of *Lewknor*, in the county of *Oxford*, being parcel of a large tract of woodland there, and which woodland of the Defendant adjoined on one part to certain woodland belonging to and in the occupation of one *Joseph Townsend*, Esquire, other parcel of the said large tract, and which woodland of the Defendant was divided from Mr. *Townsend's* woodland by a low bank or mound of earth, and a shallow ditch, such bank or mound and ditch not being a sufficient fence to prevent dogs from passing from Mr. *Townsend's* woodland, into the Defendant's woodland: that for a long time before, and

(a) *Chambre*, J., resigned, and *Heath*, J., died, in the interval between the directing of the second argument and the hearing thereof, and were succeeded by *Park* and *Burrough*, Js.

(b) It causes sensible regret to forego the opportunity of recording any portion of the learning, acuteness, and talent, by which each of the arguments on this novel

and interesting question was distinguished; but inasmuch as the principal topics are touched on in the elaborate opinions which were delivered by the Court, and the publication of the whole would extend this case to an unusual length, it is thought expedient to omit the arguments of the counsel.

— *Fugit irreparabile tempus,
Singula dum capti circumvectamur amore.*

also

also during all the time of the Defendant's possession of his said woodland, there were certain public foot-paths through the said tract of woodland, and through the Defendant's part thereof, which public foot-paths were not fenced off from the land through which they respectively led: that before the time in the declaration mentioned, the Defendant, being possessed of his said woodland, in order to preserve hares therein, and to prevent them from being killed therein by dogs and foxes, did, for the purpose of wounding and killing dogs and foxes that might come into his said woodland in pursuit of hares, cause several iron spikes called dog-spears, to be screwed and fastened into several of the trees in his said woodland, and did also for the same purpose keep the said spikes so screwed and fastened there, until and at the time in the declaration mentioned, the said spikes having each two sharp ends, and being so placed, as that each end should point along the course of some one of these tracts of the woodland which were frequented by hares, called hare-paths, and being also purposely placed at such a height from the ground as to allow a hare to pass under them without injury, but to wound and kill a dog that might happen to run against one of the sharp ends thereof, the said spikes being from their nature and positions adapted to effect the said purpose for which the Defendant caused them to be screwed and fastened into the trees, and kept there, as beforementioned: that no one of those spikes was kept at a less distance than fifty yards from any one of the said public foot-paths, some of them being at the distance of 150 yards, and others at intermediate distances between 150 and 160 yards. That before the time in the declaration mentioned, the Defendant caused notices to be painted on certain boards, placed at the outside of some parts of his said woodland, in the following words, viz. "Take notice that steel-traps, spring-guns, and dog-spikes, are set in these premises, and steel-traps are set in this wood for vermin," meaning the Defendant's said woodland; that such boards and notices remained in their places at the time mentioned in the declaration: that on the day mentioned in the declaration, the Plaintiff, by the consent and permission of Mr. *Townsend*, went into his woodland for the purpose of sporting, accompanied by a pointer dog of the Plaintiff's, of the value of 15*l.*, being the dog mentioned in the declaration: that while the Plaintiff was in the last-mentioned part of the woodland, accompanied by his dog, for the purpose, and with the permission before mentioned, and near to the Defendant's woodland, a hare rose in Mr. *Townsend's*

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send's woodland, which was immediately seen and pursued by the dog: that the hare ran, and was pursued by the dog, out of Mr. *Townsend's* woodland, over the said mound or bank, and ditch into the Defendant's woodland; and the dog, so pursuing the hare in the last mentioned woodland, ran against one of the sharp ends of the said spikes, and was thereby wounded and killed: that the Plaintiff endeavoured, as much as in him lay, to prevent his dog from pursuing the hare into the Defendant's woodland, but was unable to do so. But whether, &c.; and if upon the whole matter it should appear to the Court, that the Defendant was guilty of the premises in any one of the counts of the declaration mentioned, then the jury found the Defendant guilty of the premises in that count mentioned, and assessed the damages at 15*l.*, and that he was not guilty on the other counts.

The Court having taken time until this day to deliberate, and being divided in sentiment, now delivered their opinions *seriatim*.

BURROUGH, J., first stated the declaration and the special verdict. This case had been argued before I had a seat in the Court. The novelty and difficulties attending it had suggested the propriety of further consideration. A second argument was therefore directed, which has taken place in my time. Finding that able judges appeared to entertain opinions on the subject which did not accord with impressions made on my mind, I have read every case, which, in the course of these arguments, was cited at the bar, I have examined, as far as I have been able, the grounds on which they were decided, and I have given the facts stated in the special verdict the fullest consideration, before I formed my ultimate opinion. Pursuing this course, I have treated the judgements of those who differ from me with the greatest respect; and, had my mind at length been left in a state of doubt, my knowledge of the opinions which others entertained would have led me to believe that I had formed an erroneous judgement, but having no doubt on the subject, it is my duty to deliver my opinion. It is a great consolation to me that

[496] mine will not be a single opinion on the occasion. In questions, the decision of which depends on the principles of the common law, and which are attended with difficulty and doubt, I have been used to look forward to the consequences which must result from the decision. If great inconveniences will result from one decision, which may be avoided by a different course, I think that the Court ought, before it decides, to be satisfied that the law is clear, and that it imperatively calls for a decision which

will produce these inconveniences ; to this extent only do I suffer the idea of inconvenience to affect my mind. The wisdom of ages has in *England* perfected and established a system of law called the common law ; this law is adapted to the general regulation of the conduct of the subjects as members of society ; its principles, if accurately attended to, will be found all to point to that end. If the common law of *England* says (as contended for by the Defendant), that he may erect, and keep erected in his open and uninclosed close, for the preservation of hares, these instruments, calculated to wound and destroy, and with intent to wound and destroy all dogs which may come into that close in pursuit of hares, I know this must be founded on a supposed right to protect the species of property he has in the hares in his close, although the injury done to him would merely be a trespass. If this be law, then it will follow as an unavoidable consequence, that any man, the occupier of a close so circumstanced, may erect or place in it any instruments, however dangerous, to prevent any man, or his cattle, from trespassing on his close, with intent to wound and injure him or his cattle, who may chance to enter on the close, although a mere trespass is thereby committed ; and this, although the same common law has provided apt remedies for every injury he may sustain by such entry. An action for damages may be sustained against the man, for the damage done by himself or his cattle, or the cattle may be distrained (but not killed or wounded), for the damage done. I admit in the fullest terms, that if the owner of the close were to tell *A.* that such instruments were placed, and he were, notwithstanding, wilfully to run against them, that he could not complain of the injury in a court of law. The special verdict in this case does not state that the Plaintiff, or Mr. *Townsend*, had notice of what was done by the Defendant. If such a fact had been material, it ought to have been positively found ; but circumstanced as this case is, I conceive it not to be material. The Defendant must, I conceive, mean to contend, that he has a right to do what he has done, as against all mankind. In the case on this record, he contends that he is justified as against one, who is, by the permission of Mr. *Townsend*, lawfully sporting on his land ; and, in effect, as against Mr. *Townsend*, who is circumstanced in every respect as the Defendant is ; and this, although Mr. *Townsend* may be thereby interrupted in the same uses and enjoyments of his lands and the hares therein, which the Defendant

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ant claims to be entitled to. I cannot find any principle of the common law which clearly warrants this. What the Defendant is found to have done must be carefully distinguished from things done to guard a dwelling-house, and enclosed property occupied with it, from the depredations of robbers, of persons who come thither for the purposes of committing felony, and from persons who come thither for the doing such violence to man as would amount to a breach of the peace, and be indictable as such. In *Brock v. Copeland*, cited at the bar, the Defendant, a carpenter, kept a dog for the protection of his yard, and for that purpose let it loose at night; Lord *Kenyon*, on that occasion, said, "Every man has a right to keep a dog for the protection of his yard." I mention this, only as an instance; any other species of protection may be resorted to; and persons who enter for plunder, have no right to complain, if damage is done to their persons. They are criminal wrong-doers, who enter for the purpose of committing felony or breaches of the peace. Having said this much by way of introduction, I will state more distinctly the principles which govern my judgement. First, I am of opinion, that the acts of the Defendant stated in the special verdict were unlawful, and that the Plaintiff, having sustained an injury thereby, without any default in him, is entitled to to maintain this action. Secondly, I am of opinion, that if the Plaintiff had been a trespasser, or otherwise in default, by the entry of his dog on the Defendant's premises, as stated in the special verdict, the Defendant could in no manner have justified the direct killing of the dog. Thirdly, I am of opinion, that he cannot justify doing that indirectly, which he would have not been warranted in doing directly. As to the first of these propositions, that the acts of the Defendant stated in the special verdict were unlawful, and that the Plaintiff, having sustained an injury thereby, without any default in him, is entitled to maintain his action. After stating the situation of the Defendant's and Mr. *Townsend's* property, the verdict states, that the Defendant, in order to preserve hares in his woodland, and to prevent them from being killed therein by dogs and foxes, did, for the purpose of wounding and killing dogs and foxes that might come into his woodland *in pursuit* of hares, cause the instruments to be erected in the hare-paths in his wood, so as to wound or kill any dog that should happen to run against them; and being, from their nature and position, adapted to effectuate the said purpose for which they were screwed and fastened to the trees.

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trees. The principle of *Sic utere tuo, ut alienum non lædas*, is familiar to every one. In a very useful book, *Jacob's Law Grammar*, in * which many principles of the common law are collected, I find the same principle stated more fully, and in a manner which more clearly shows its true meaning. It there runs thus: *Prohibetur ne quis faciat in suo, quod nocere possit in alieno; et sic utere tuo, ut alienum non lædas*. This principle is, in all its parts, restrictive of the use a man may make of his own property. It shows he is not to make *any use* he pleases of it, but that he is so to use it, as not thereby to injure another; he must look forward to the situation of others. Another may be injured in his person or his property; he is not to injure another in the enjoyment of his rights or property. Every case of (what is ordinarily called) nuisance, which is injurious to another in the enjoyment of his property, whether by setting up a noxious trade, a noisy occupation, or by erecting a building which darkens another's lights, is an instance fully within the rule, and governed by it. Intention to cause the injury is not the governing feature of all these cases, although it may in many cases of the kind be an important fact: if the thing be done, and the injury to another's rights be the consequence, the law will, if necessary, supply the intention. But I conceive that express intention may make that act in some cases unlawful in the beginning; so that where the injury intended follows, a right of action accrues, when, if there had been no such intention, it might be doubtful whether the party would have any ground of action. The noxious trade, the noisy occupation, or the erection of the building, considered abstractedly from the rights of others, is perfectly innocent; but if another has an existing right, and is in consequence injured by it, or prevented from the reasonable enjoyment of such right, he sustains an injury, for which an action may be maintained. I conceive that every person is protected by this rule, who has a right equal to that of him who does the act, and who is injured, without his default, in the exercise of that right. In the case of the nuisances which I have particularized, the intention to do the injury is not an essential ingredient in the action. The act, and the injury to the right, are the essential ingredients. In cases where intention is necessary, the law will supply it. In *Parkhurst v. Forster (a)*, which was an action against the Defendant, a constable, for il-

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(a) 1 Lord Raym. 480.

1817. legally billeting a dragoon on the Plaintiff, and forcing the Plaintiff to find meat, drink, and lodging for him, the special verdict found, that the Plaintiff kept a house at *Epsom* for those who came there for the air, and to drink the waters there, and sold small beer to his lodgers, and that the Defendant had billeted a dragoon, and that the dragoon forced the Plaintiff to find the meat, &c. It was objected for the Defendant, that there was a variance between the fact in the verdict, and in the declaration. Lord *Holt* said, At common law, if a man does an unlawful act, he shall be answerable for the consequences of it, especially where, as in this case, the act was done with intent that consequential damage should ensue. There are cases, however, where intention is essential in fact:—an instance of which is of modern date. *Jefferies v. Duncombe (a)*. In this case the Defendant had erected and placed a lamp in the front of and near adjoining to the Plaintiff's house, and kept it lighted there in the day-time, meaning thereby to mark out the Plaintiff's house as a house of ill fame. It was objected at *nisi prius* that this was not actionable. It was holden by Lord *Ellenborough* to be so, and the Court afterwards sustained the action. Here, the act by itself would not have been unlawful, as against any individual, but the intent of doing so to the injury of the Plaintiff, made it so. In the present case, the fixing and screwing the spears are not the cause of action: but the doing it with intent to wound and destroy all dogs which should come on the Defendant's land in pursuit of hares there, and thereby destroying the Plaintiff's dog in the manner stated in the special verdict. He has done that which was calculated to kill and destroy every dog which followed a hare from other lands in the Defendant's woodland, as well as dogs which should come immediately into his woodland for the purpose of finding and pursuing hares there. I am of opinion that was calculated in general, and more particularly so as against Mr. *Townsend*, and the Plaintiff, who must, I think, be deemed to be his representative.

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In pursuing this subject, it is fit to consider what the respective rights of the Defendant and Mr. *Townsend* were. Each had the same species of property in his respective woodland. Each might use his land for taking game found therein for food, or might pursue it for pleasure. Each might have separated and divided

(a) 11 *East*, 226.

his land from the other by impassable bounds. But they elect to occupy their respective property, divided only by a bank or mound of earth and a shallow ditch, not being a sufficient fence to prevent dogs from passing from the one to the other. The Defendant says, that merely in respect of his possession, he may, for preserving that property which he has *ratione soli*, place these instruments in his lands for the destruction of all dogs coming there in pursuit of hares. If so, it must be admitted that Mr. Townsend may do the same. If this was done on both sides, this would render the property to be preserved by these means of no use; for neither could enjoy it without the certain destruction of the dogs used as the means of enjoyment. I cannot conceive that this can be a rational or legal use of property. I think neither of them can do this; for he who on either side pursued the hares from the one woodland to the other woodland, would be a mere trespasser by the entry of himself and dog, or of his dog only, if encouraged to go there by him; for which injuries the law has provided, as I have before suggested, ample remedies. The case of a person having land adjoining the land of another, and putting cattle on his land, which wander into the other's land, was mentioned at the bar, in order to show that a trespass would be thereby committed; of which no one could ever doubt, because there it is the duty of the owner of the cattle to watch and guard them. It is possible to do this, and therefore he must do it: and not having done this, he is a trespasser. I do not see how this advances the Defendant's case. The case of persons having common by reason of vicinage is much more like the present. There each of the owners of the respective common or waste may enclose, but neither does; and the persons having right of common on the respective commons or wastes turn thereon their cattle: these cattle wander from the one common to the other; yet no action of trespass lies: Why? Because it is matter of mutual convenience; and to require the commoners on either side to watch their cattle and keep them on their respective commons, would be to require a thing to be performed which man is incapable of doing. How are the Defendant and Mr. Townsend situated? The Defendant *ratione soli* of his woodland, and Mr. Townsend *ratione soli* of his woodland, had a species of property in the hares on their soil. This appears to be the settled doctrine, from the case of *Sutton v. Moody* (a), and *Churchward v. Studdy* (b).

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(a) 1 Lord Raym. 250. S. C. Com. 34.

(b) 14 East, 249.

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It is fit to mention here, that in the hare which was started by the Plaintiff on Mr. *Townsend's* land, had it been killed by the dog, the property would have been vested in the Plaintiff, or in Mr. *Townsend*. This is manifest from the authorities I have referred to. It is now contended by the Defendant, that one having this species of property, may do for the preservation of it acts which he cannot legally do for the prevention of trespasses on his soil, by reason whereof he has this qualified transient property. I am of opinion, that neither for the purpose of preserving game, or for the prevention of ordinary trespasses, can the occupier of the soil lawfully place engines or machines, for the purpose of preserving or protecting such property, with intent thereby to kill or wound the dog used by its owner who uses it on the land, or to do personal injury to the owner himself. But the Plaintiff was not even a trespasser, nor was he in default. It is a well known principle of the common law, that it does not require of any man to do impossibilities. In the present case, it cannot be urged that the Plaintiff was not lawfully on Mr. *Townsend's* land, in lawful exercise of Mr. *Townsend's* rights, by his license, and with his authority. If the Plaintiff has done wrong to the Defendant, or was guilty of any default, when did either of these things commence? Was it when he entered Mr. *Townsend's* land? Was it when he was sporting there? Neither of these things can be urged. Was it when the hare was started, and was pursuing its own coursetowards the Defendant's land, before the dog pursued it? That cannot be said; for over the hare the Plaintiff had no controul. Was it when the dog pursued her? No; for the verdict says, that the Plaintiff endeavoured, as much as in him lay, to prevent his dog from pursuing the hare into the Defendant's woodland, but was unable so to do. Yet it is urged at the bar, that notwithstanding the situation of the properties of these gentlemen, notwithstanding the Plaintiff's exercise of a lawful right under Mr. *Townsend*, notwithstanding his utmost endeavour to prevent his dog going into the Defendant's woodland, notwithstanding he is neither a trespasser or a defaulter, he is to have no satisfaction for the loss of his property, destroyed by the acts of the Defendant, calculated and effectually planned to destroy all dogs that should come into his woodland in pursuit of hares; and this, too, a case, where the dog pursued a hare in which the Defendant had no interest *ratione soli* at the time. Here I think it proper to take notice of the case of *Blyth v. Topham* (a), cited for the purpose of showing that it was the default

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(a) Cro. Jac. 158.

of the Plaintiff. The declaration stated, that the Defendant dug a pit in his common, by means whereof the Plaintiff's mare, being straying, fell into it, and perished. This was held to be naught, for when the mare was straying, and Plaintiff shows not any right why it should be there, the digging of the pit was lawful as against him. I answer to this, that for any thing that appears to the contrary, first, the digging this pit was lawful as against every body. It might have been a gravel-pit or chalk-pit dug in the ordinary use of the soil. 2dly, There is no intention to produce damage to any one stated or suggested in that case. 3dly, The default was wholly in the Plaintiff, in permitting his mare to stray. If this had been held to be actionable, a man could not use his own land, he could not procure chalk, &c. for the manure of his land, without peril of being ruined by the neglect of others. How can this case be assimilated to the Defendant's case, who intentionally places the sharp instruments to produce the mischief he has effected, and without any statement on the record that this was a means necessary for the preservation of his hares, and without which they could not be preserved? For these reasons I say, that the acts of the Defendant stated in the special verdict were unlawful, and that the Plaintiff having sustained an injury thereby, without any default in him, is entitled to maintain this action.

My second proposition is, that if the Plaintiff had been a trespasser, or otherwise in default, by the entry of his dog into the Defendant's premises as stated in the special verdict, the Defendant could not in any manner have justified the direct killing of the dog. This proposition scarcely requires any authority; common sense is against such an act. Every lawyer knows, that the law has provided ample remedies for such injuries: a remedy *in rem*, where the thing doing the damage can be taken, and this secures a satisfaction; but in that case the party distressing cannot kill, injure, or otherwise use the distress, than for its preservation, as milking a cow. It has also provided a remedy *in personam*, by action, where the thing doing the injury for any cause cannot be distressed. But there are authorities on this head which are most important. I consider the case of *Beckwith v. Shordike and Another* (a), as a strong authority to this effect, notwithstanding the result of the peculiar case. That was an

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(a) 4 Burr. 2092.

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action of trespass for entering the Plaintiff's close with guns and dogs, and killing his deer. The Defendant pleaded not guilty; the jury found him guilty, and gave 30s. damages. A motion was made to set aside the verdict. The Judge who tried the cause was of opinion, that the jury ought not to have found the Defendants guilty, it being an accident that happened without their intention, and against the inclination of the Defendants. The Court said, that those cases must depend very much upon the particular circumstances appearing in evidence, whether the persons who owned the dog, which, in their company, did the mischief, were or were not trespassers. The jury were to judge *quo animo* they entered the close. The Court said, that the Judge, though he might think otherwise, did not direct them which way to find their verdict, but left it to them. Lord Mansfield. The damages are so small, that it is not worth while to set aside the verdict on payment of costs. The play would not be worth the candle. This supports my first proposition; but I did not mention it before, thinking it well introduces a case in which the doctrine laid down by the Court is in point on this head. I mean the case of *Vere* against Lord *Cawdor* and *King* (a). Trespass for shooting and killing the Plaintiff's dog. The Defendants pleaded the general issue. The Defendant *King* pleaded specially, that Lord *Cawdor* was possessed of a close, part of his manor of *Kidwelly*, of which he was Lord, and that the Defendant *King* was gamekeeper of the manor, duly appointed to preserve the game upon the said manor; that the Plaintiff's dog was in the close of the said Lord *Cawdor*, being part of his said manor, running after, chasing, and hunting hares there, and that the Defendant *King*, being gamekeeper, for the preservation of the said hares, shot and killed the dog. To this plea there was a demurrer. Here was no attempt to put on the record a plea of a justification in respect of the possession. But the case is put on a much more rational ground, a justification under the game-laws. The language of Lord *Ellenborough* applies most forcibly to the proposition I am now maintaining. His Lordship says, "The question is, whether the Plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, which outrages all reason and sense, it is of no authority to govern other cases.

(a) 11 East, 568.

There is no question here as to the right of the game. The gamekeeper had no right to kill the Plaintiff's dog for following it. The plea does not even state, that the hare was put in peril, so as to induce any necessity for killing the dog in order to save the hare." Here the Defendant was clothed with all the exclusive powers vested in him as gamekeeper, under the system of laws commonly called the game-laws: and yet the action was maintained by the Court of King's Bench against him, and his plea was held to be bad. Suppose, in this case, the Defendant had shot the Plaintiff's dog: what defence could the Defendant have put on the record? His plea could only have been, that he was possessed of a close called the *Woodlands*, in which there were hares; that the Plaintiff's dog followed a hare from Mr. *Townsend's* close, and he the Defendant, to preserve that hare, shot the dog. This is the case on the record: On demurrer, such a plea must have been held to be bad.

The third and last proposition I have to state, is, that the Defendant cannot justify killing the dog indirectly, if he could not have justified the doing it directly. In support of this proposition, I need only resort to the store-house of wisdom, the common law of *England*. There I find it written in plain terms, that *Quando aliquid prohibetur ex directo, prohibetur et per obliquum* (a). The law, I contend, forbids the killing of the dog directly, for a mere trespass. The Defendant is not justified in doing that by indirect means, which he could not lawfully do by direct means. Other cases were cited at the bar, besides those I have mentioned. I have read and considered them, but have particularly referred only to such as, in my judgement, bear materially on the question before the Court.

If I still find that the Court is divided on the question, thinking it, as I do, a matter of great importance to the public, and to be a case that ought to be decided the one way or the other, I shall decline giving my judgement on this occasion, that the party may have the judgement of this Court re-considered in another.

I add this for the good of all who hear me; I counsel them to abstain from acts of this kind; and though these acts are usually done for the preservation of the game, I recommend to them to consult their lawyers, and trace all similar acts to their conse-

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(a) *Wingate*, 680.

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quences as they may affect the life of man, before they venture to repeat them.

PARK, J. The facts of this case, as alleged in the first count, of the declaration, and as found by the jury, have been so fully stated by my brother *Burrough*, that I need not repeat the former part; but the material facts, as found by the special verdict, when stripped of all technical language, are these, that a large tract of woodland, belonging to the Defendant adjoined upon a piece of woodland belonging to a gentleman of the name of *Townsend*, separated only by a low bank or mound of earth and a shallow ditch, but *not being a sufficient fence to prevent dogs from passing* from the one woodland to the other; that through the Defendant's woodland there were public foot-paths, not fenced off from the rest of the land; that the Defendant, for the preservation of hares in his woodland, and to prevent them from being killed by dogs and foxes, did, *for the purpose of wounding and killing dogs and foxes* that might come into his woodland in pursuit of hares, cause *several iron spikes called dog-spears*, to be screwed and fastened into several of the trees in the woodland, and *did also, for the same purpose*, keep those spears fastened over the hare-paths, and they were *purposely placed* at such a height, as to allow a hare to pass under them without injury, but *to wound and kill a dog* that might happen to come against one of the sharp ends, and *the spikes being adapted to effect the said purpose*: that none of the spikes were at a less distance than fifty yards from the public foot-path: others at much greater; namely 150 or 160 yards; that the defendant had caused notices to be painted on boards at the outside of his premises, "Take notice that steel traps and spring guns, and *dog-spears* are set in these woods and premises; that the Plaintiff, by the consent and permission of Mr. *Townsend*, went into the woodland belonging to Mr. *Townsend*, for the purpose, of sporting, accompanied by a pointer dog; that a hare rose in Mr. *Townsend's* grounds, and was seen and pursued by the Plaintiff's dog; that the hare ran, and was pursued by the dog *over the mound*, into the Defendant's woodland, and ran against one of the sharp ends of the spikes, and was thereby killed; that the Plaintiff *endeavoured, as much as in him lay, to prevent the dog from pursuing the hare into the Defendant's woodland*, but was unable to do so. These are the facts, and the question is, whether the Plaintiff can, under these circumstances, maintain an *action on the case* for

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for the value of his dog. I am of opinion that he may; and knowing from what ability and authority I differ, I cannot but deliver that opinion with great diffidence, though I honestly entertain it after the most mature deliberation and consideration of all the cases. Some things are clear; no *trespass* has been committed in this case. The act of the dog was not a trespass. No action of trespass would lie against the owner, unless he had incited the dog; the contrary was the case, for it expressly appears that he was lawfully using his dog, under the authority of the owner of the ground where he was sporting; and when the dog escaped, instantly endeavoured to restrain and call him back. The distinction between voluntary and involuntary acts, which constitute a trespass in the one case, and not in the other, is well taken in *Millen v. Fawdrye* (best reported in *Popham*), and *Beckwith v. Shordike and Another*. But it was said at the bar, this dog was an intruder, and was there without license. I do not know what intrusion is, as applied to this subject-matter. At all events it cannot be a stronger act than a trespass; I have shown that this was not a trespass, and I shall presently endeavour to show, that even if it were a trespass, the defendant would not have been warranted, under the circumstances, in doing what he did; *a fortiori*, if it was an involuntary act, and one which the Plaintiff did all in his power to prevent. Another point I take to be clear, that if an actual trespass had been committed by horses, sheep, or other cattle, which the owner is bound so to keep as to prevent them from trespassing, the owner of the ground could not have killed the animal directly, unless it became necessary to do so, in order to prevent the actual destruction of some of his own property. Such a direct act of killing would have been an act of trespass. For this the case of *Vere v. Lord Cawdor* is an express authority, and the opinion of Lord *Ellenborough* is so strong to this case, that I must occupy some little time in stating it. Here the learned Judge fully stated that case, *ut supra*. That was an action of trespass, because the killing was direct. Here the fixing of the spikes in the Defendant's own ground could of itself not be a trespass, but it is the consequence of the act of which the Plaintiff complains; and when the Defendant fixed the spikes, he must be considered as having contemplated the probable consequences of his own acts. Indeed, this special verdict does not leave any doubt on this point; for it is found, that these spikes were placed there for the

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the purpose of wounding and killing dogs. I assume it as another clear proposition, *that under the circumstances the hare in question was not the property of the Defendant, and therefore it was not necessary to kill this dog for the protection of the Defendant's property: for it was admitted at the bar, that if the hare had been killed in the Defendant's ground, it would not have been his. Indeed this has been decided in many cases; in *Sutton v. Moody*: "If *A.* starts a hare in the ground of *B.*, and hunts it into the ground of *C.*, and kills it there, the property is in *A.* the hunter." This is stated as text law in *Blackstone's Commentaries* (a), and finally confirmed in *Churchward v. Studdy*. It must be admitted, then, upon these authorities, that as there was no voluntary trespass, as there was no property of the Defendant's own to protect, neither the Defendant, nor his servant, could have stood there with a gun, and shot this dog in pursuit of the hare. Why? because it is said at the bar, a man ought to exercise a discretion. I have ever thought it quite clear, that no man shall do that indirectly, which he cannot do directly. The placing these dog-spears for the *express purpose of killing*, is, as it appears to me, just the same as if the Defendant had placed a man there for the purpose of *shooting*. Nay, it is worse; for in the one case, a man would exercise a discretion; but here, death must inevitably ensue without any discretion being possible to be exercised, without any regard to circumstances, and without giving the opportunity of knowing what the circumstances might require. If, then, an actual trespass on the ground would not justify the destruction of this animal, without some apparent necessity to preserve the Defendant's own property from destruction, how can it be justified by that which was not a trespass, nor even the subject of an action on the case? The dog cannot be said to be an intruder, for the Defendant had taken no means to prevent dogs from coming into his land; for it is expressly found by the verdict, that the mound and ditch were not a sufficient fence to prevent dogs from passing from the one woodland into the other; and Mr. Justice *Doddridge*, in the case in *Popham*, mentions there being no fence as a circumstance worthy of observation. Indeed, from the placing these spears, as it is found, for the purpose of destroying dogs, it is evident they were expected to come, and, knowing the roving disposition of a dog, which, as some of the cases state, cannot be ruled suddenly, the

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law has provided, that the act of the dog shall not make the owner a trespasser, unless he has incited the dog to do the particular act. Even an action on the case will not lie against the owner for a mischief committed by a dog, unless it be alleged that the dog had the vicious propensity to bite, or to the sort of act complained of, and also the owner's knowledge of the animal having that propensity. But here the animal only followed his natural bent; and it must ever be remembered in this argument, that the hare did not belong to the Defendant. A case from *Cro. Jac. of Blithe v. Topham* has been much pressed by my brother *Bosanquet*. The same case is mentioned in *Roll (a)*. If *A.*, seised of a waste adjoining to a highway, dig a pit in the waste, within 36 feet of the highway, and the mare of *B.* escapes into the waste, and falls into the pit, and dies there, yet *B.* shall not have an action against *A.*; for his making the pit in the waste, and not in the highway, was not any wrong to *B.*, but it was the fault of *B.* himself that his mare escaped into the waste. It is sufficient to observe that two most material facts are found in the present case, which are not existing in the case in *Roll.* and *Cro. Jac.*, namely, that *B.* is there stated to be himself the faulty person, in suffering his mare to escape. Here, on the contrary, it is found, that the Plaintiff endeavoured, as much as in him lay, to prevent his dog from going on the Defendant's land, but in vain. A man may, and easily can, control his horse, but he cannot control his dog. All the cases in the law which oppose such an action in the Plaintiff, go upon the ground, that he has not used ordinary caution. But the case in *Roll* differs from this at the bar in another most material respect, viz. that it is not found that the pit was dug for the purpose of killing mares. If it had, and had been decided for the Defendant, I then should have thought it a strong authority; but, as it stands, I do not feel the weight of it. A case of *Brock v. Copeland* was also quoted, for an opinion of Lord *Kenyon*; but it is to be observed, that the decision of the learned Chief Justice turned expressly upon this, that the Defendant had properly let loose the dog, and the injury had arisen from the Plaintiff's own fault, in going incautiously into the Defendant's yard; after it had been shut up. But the latter part of what Lord *Kenyon* states, with regard to what had happened before him and the whole Court in another case, shows to my mind most manifestly, that had his

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Lordship had a similar case to this before him, he would have been clear for the Plaintiff. In an action against a man for keeping a mischievous bull that had hurt the Plaintiff, it having appeared in evidence, that the Plaintiff was crossing a field of the Defendant's where the bull was kept, and where he had received the injury, the Defendant's counsel contended, that the Plaintiff, having gone there of his own head, and having received that injury from his own fault, the action would not lie: but it appearing also in evidence, that there was a contest concerning a right of way over this field wherein the bull was kept, and that the Defendant had permitted several persons to go over it, as an open way, Lord *Kenyon*, C. J., had ruled in that case, and the Court of King's Bench had concurred in opinion with him, that the Plaintiff having gone into the field supposing that he had a right to go there, and the Defendant having permitted persons to go there, as over a legal way, he should not then be allowed to set up in his defence the right of keeping such an animal there, as in his own close; but that the action was maintainable. The case of *Butterfield v. Forrester* seems to me to be an authority for the doctrine I am maintaining. It was an action on the case. A man repairing his house at the end of a town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. This erection, therefore, was not put up to cause, but to prevent mischief. The Plaintiff, riding unusually hard through the streets of *Derby*, did not see this obstruction (though he might have seen it a hundred yards off), rode against it, fell with his horse, and was much hurt. The jury found for the Defendant, and the Court confirmed the finding; Lord *Ellenborough* saying, amongst other observations, that two things must concur to support this action, an obstruction in the road by the fault of the Defendant, and no want of ordinary care to avoid it on the part of the Plaintiff. Here those two things do concur, the wilful erection of these spears by the Defendant, for an unlawful purpose, *viz. to kill dogs*, and no want of ordinary care in the Plaintiff, for he did all he could to control his dog, but in vain. If the Defendant is warranted in putting these spikes where he did, he might equally have done so, if his wood had run along the high road, and no mound or fence between but such as that in question; for the distance can make no difference. The sort of protection, therefore, which the Defendant has resorted to for the prevention of that, which, at the most, is a trespass, might have been fatal to human

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man life; and when we are weighing whether a thing can be done, or not, all the consequences of such an action must be looked to. If upon this special verdict it had been found, that there was fault or blame in the Plaintiff, the case might have been different, and this notion of fault in the Plaintiff I have shown to be a considerable feature to guide the decision of the cause; and my brother *Bosanquet*, feeling the importance of such a fact, wished to make out negligence or misconduct in the Plaintiff; but I did not hear him state one fact to that end; he said the Plaintiff had notice, and therefore it was his own fault. It is true, he was aware of the notice, and so far from being in fault, he does all he can to comply with it; for, having a right to be where he was, and his dog having raised the hare, and pursuing her, the Plaintiff "*endeavoured as much as in him lay, to prevent the dog from pursuing the hare, but was unable to do so*". What could the Plaintiff do more, except never going out of his house, into his own, or his friend's ground, with his dog? But the Defendant might have done more; for if he chose to put up these spikes, he ought to make the approach to his land more inaccessible, by putting up fences where so much inevitable danger lurked. Here, then, is a temporal loss or damage sustained by the Plaintiff, as the immediate and contemplated consequence of the act of the Defendant. It may be true that a similar action in *specie*, is not to be found in any law-book; and I admit, that if the case were new in principle, it would be necessary to apply to the legislature, and not to a Court of law: but where the case is one new in the instance, and the question is upon the application of a principle recognized in the law to such new case, it will be just as competent to Courts of Justice to apply the principle to a case which may arise two centuries hence, as it was two centuries ago. This is the very nature of an action on the case. Here is a temporal loss or damage sustained by the Plaintiff (who has done no wrong, and who used every degree of caution and exertion to avert it) by the tortious act of the Defendant, who must take the consequence, if his neighbour thereby sustain an injury. The two things here concur, which Lord *Ellenborough* requires, to support such an action; fault in the Defendant, and no want of ordinary care to avoid it on the part of the Plaintiff. For these reasons, I am of opinion that the Plaintiff is entitled to recover.

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DALLAS, J. It has been admitted at the bar, that this case is, in point of circumstances, altogether new, and therefore the argument

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argument has properly proceeded on general principles, and analogies, real or supposed.

The question is, whether, under the facts found by this special verdict, the Defendant had a right to place the dog-spears in the manner, and for the purposes, for which they are found to have been placed, whereby, and as a consequence to be foreseen, the dog of the Plaintiff has been killed, and for the loss of which the action has been brought.

And first, with respect to the alleged inhumanity of the proceeding, which has been adverted to at the bar, and may weigh with many persons on the first view of the subject. It is not disputed that in some cases a dog may be killed for the preservation of a hare. In that cited at the bar, of a dog found in a warren, this was expressly decided; yet, in point of humanity, where is the difference between destroying a dog in a warren, or in a cover for the preservation of game. It will be no answer to say, that a warren is a privileged place; for whether privileged or not, or whether game be property in one place, and not in another, though this may furnish a distinction applicable to the case, in other respects, it can make no difference on the present view of it.

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With respect to the particular mode of destruction, though this may be of fit moral consideration, it can scarcely be contended, that the law will distinguish, permitting a dog to be destroyed in one way, and yet forbidding it in another. The question is upon the right to destroy, and not upon the mode of destruction, as to which subject to be judged of by others, every man must judge for himself. It has also been stated, that nothing appearing to the contrary, it is to be presumed the Plaintiff was qualified. To this I cannot agree, for if the fact were material, it should have been found one way or another, but, in my view of the subject, it is of no consequence: for, if qualified, he could have no right to trespass on the Defendant's grounds, and if unqualified, the Defendant could have no right beyond seising the dog, supposing he had by himself or his servant been present at the time. As little can depend on the circumstance that the Plaintiff was sporting with the permission of the owner of the land on which the hare was started; for this could only be a license as to the land of such owner, and could give no right to go upon neighbouring land belonging to a different person. Nor can the distinction between wilful and involuntary trespass make any difference in this respect; for the question

question has been argued on ground applicable to the one as well as to the other, viz. that whether the trespass be voluntary, or involuntary, the party thereby injured had no right to act as the Defendant had done.

It has further been stated, that there were different paths going through this wood; but this, also, appears to me to make no difference; for as to the Plaintiff, he was not in the exercise of any right of way, much less within the limits of such way; but, on the contrary, professing to have been involuntarily on the land in question; and if this had been the case of a person exercising a right of way, it is found that not one of these dogspears was placed at a less distance than fifty yards from any path, and most of them at the distance of one hundred and fifty, so that if the injury had occurred in the exercise of any such right, the case would depend on very different considerations. In effect, according to the range the argument has taken, nothing will turn on whether it be a close or preserve with a right of way through it, or not; for in the one case, as in the other, it has been contended it would be illegal to place instruments of this description.

Nor do I think it requisite, in this case, to consider how far, and under what circumstances, game is to be treated as property, and to what effect; for here, again, the argument in support of the Plaintiff's case, does not depend on this distinction; but it is maintained, that even though for the preservation of that which is admitted to be property, as herbage, underwood, fruits of the surface, soil itself, or whatever as property will form the subject of trespass, still, what has been done in this case was unlawfully done, and the Plaintiff is entitled to recover.

One other point only remains, before I come to the question itself; which is, how far the present decision will apply to measures that may by direct operation, or necessary consequence, affect human life. As to this, I will only observe, such cases seem to me to depend on different grounds, the law distinguishing, to many, and most essential purposes, between property and the life of man; and to the facts of this case only, my present opinion is intended to apply.

I shall now, shortly, advert to the cases cited. And the first class goes to distinguish between voluntary and involuntary trespass; as in the instance of cattle passing along the road, and consuming grass and corn, or the dog chasing sheep, and other cases of the same description, the owner doing all in his power
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to prevent it. To the doctrine and to the authority of all such cases I fully subscribe; and if this action had been trespass against the present Plaintiff, by the present Defendant, the former might have defended himself on the facts found by this special verdict, but whether an action of a description precisely opposite, that is, an action brought against the owner of land for a damage sustained by a party having no right to be there, for an use made of the land by the owner, and being therefore there only under circumstances to make it excusable trespass, such damage being induced altogether by his own act, whether voluntary or not, whether such action will lie, is a question altogether different. Suppose, the trespass being voluntary, an action would lie, it will scarcely be contended that being involuntary, though this might excuse the party, it would give him a right of action against the owner of the soil for a damage, though resulting from an involuntary act. The case would have been in point, if the dog chasing the sheep or hare had been injured in such chase, and for the mischief incurred, an action had been brought; but no such case has been cited; and it must be admitted, that this action is a perfect novelty, though, with more or less of extent, this and similar practices have long and notoriously prevailed. To the next class of decisions I also equally accede; namely, those which establish, that you shall do no more than the necessity of the case requires, when the excess may be in any way injurious to another; a principle which pervades every part of the law of *England*, criminal as well as civil, and indeed belongs to all law that is founded on reason and natural equity. It would be superfluous to advert to particular instances. Admitting, therefore, the authority of these cases, but denying their application, it will not be necessary to follow them in detail, and I shall come at once to the ground on which it seems to me they are to be distinguished from the present.

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And it is this; they all turn on the fact of presence. Such was the case in which the Defendant pleaded that he killed the Plaintiff's dog to preserve his own; the plea was held bad, because it did not allege that his own dog could not be otherwise saved; and so in *Vere* against *Lord Cawdor*, because it was not averred that it was necessary to kill the dog for the preservation of the hare. So, in the case of nets, they might have been detained without being destroyed; or, as it was properly put in the argument at the bar, where the owner of the property is present,
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and has the means of prevention in his own hand, he is bound to exercise his judgement, and not to do more than is immediately necessary; but it does not follow from this, that he may not take measures for the general preservation of his rights during his absence, the nature of which must depend upon considerations altogether different. All such cases are, for these reasons, to be distinguished, as it seems to me, from the present. It is contended, however, that they apply; and, if you may not kill a dog by your own immediate act, or order, neither can you by means provided to induce such consequence, when not personally present; for what, it is asked, is the difference between killing with your own hand, with an instrument placed therein at the time, or by an instrument placed by that hand on the ground, for the future purpose? That which it is unlawful to do by direct means, it is equally unlawful to do by indirect means; and to this point the case of *Vere* against *Lord Cawdor* is cited.

But here, again, it appears to me, there is a misapplication of principle.

Is it illegal to place spikes or glass upon a wall? and if a party climbing over be thereby wounded or cut, can he bring an action? And yet, if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand, or cut him with the glass. Or (to bring it home to the present case) suppose that, in order to separate his property from that of his neighbour's, the Defendant had erected a wall, and put spikes or glass upon it, and that the Plaintiff had been wounded in attempting to get over, could this action have been maintained? If not, where is the distinction between spikes on the ground, with notice that they are there, or notice given by the visibility of the spikes themselves? With respect to the owner of the dog, certainly none, and for the conduct of the dog the owner is responsible, if not to the extent of giving an action against himself in a case where all is done that could be done to restrain the dog, yet, at least to exempt the owner of the soil from an action for an injury done to the dog. But, if the owner had taken his station on the wall, he could not in person have made use of the glass or spikes. The doctrine depends on a broad distinction. Presence, in its very nature, is more or less protection; absence is abandonment and dereliction for the time; presence may supply means, and limit what it supplies; but if, during absence, property can

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only be protected by such means as may be resorted to in the case of presence, all property lying open to inroad can have no protection, at least by any act of the party himself; for to say that he can only be protected when absent, by such means as he could use if present, is a contradiction in the nature of things.

But, it is further said, you shall make such use of your own property as not to injure that of another; and to this also I agree, in the true sense of the maxim, which is, the right of another, for if, in breach of this rule, my right be invaded by another, what is done by me, if only adequate to repel such invasion, is not an infringement of his right, but a defence of my own, and must turn on the consideration of what, to defend such rights, I am permitted by law to do.

On this foundation, stands the whole law of actions on the case for consequential damages, and the doctrine of nuisance, as it may affect individuals or the public, in all its variation of form. The difference is, between absolute and relative rights, between that which is mine, exclusive of any right in others, present or future, and that which is of a spreading, shifting possession, as air, water, &c., in which I have but a qualified possession, a possession subservient to the future use by others. If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public, or individuals having a right of way over it, an action will lie, because there is a right in others to pass along without interruption; but if there be no right of way, I may with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained. So, in the case put of a ditch, I may not dig it, so as to interfere with any public or private right, but within the limit of my own property adjoining a common, and not separated from it by any actual fence, I may dig a ditch, however wide; and man or beast sustaining harm, having no right to be there, no action will lie. Such was the case cited of the horse straying from the common, and falling into the pit, and in which it was determined that no action would lie, first, because the owner had a right to do what he pleased with his own land, and next, that the Plaintiff could show no right for the horse to be there; and yet, that a horse might, in the night or day, stray from an open common into adjoining land, not separated by any fence, was, as a probable consequence, as much to be foreseen, as that a hare might

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might spring up, and a dog chase; or, if the horse had escaped from the owner, and he had sustained damage in the pursuit, would that have given him a right to damages for the consequence of an escape, which he ought, in strictness, to have prevented? I may not keep a mischievous bull in a field through which there is a right of way; but when there is no right of way, I am entitled so to do, as was stated by Lord *Kenyon* in one of the cases cited at the bar, and this, by way of illustration, for the very purpose of showing the distinction in question. The only case cited on this part of the subject, as bearing the other way, is that of *Townsend* against *Wathen*; but in facts and circumstances it has no resemblance to the present. The object in the former was to attract, in order to destroy the dog; and in this, the immediate purpose was to keep the dog from a situation, in which he might incur destruction. In *Townsend* against *Wathen*, the enticement was made to operate beyond the line of the Defendant's property, and to the destruction of the dog, where the dog had a right to be; and this enticement constituted the foundation of the action. It is, in effect, but the common case of nuisance.

But no decision has established, that a trap placed by a man in his own land, and not calculated to operate so as to allure, beyond, or even within the limit of such land, would be a trap unlawfully placed. But it has been argued that the principle of the case, at least, applies in this way, that though the enticement be not the direct act of the party, yet it arises, of necessity, from the act done; as, for instance, that a hare lying near the hedge of a highway forming one side of a woodland in which spears are put, may operate to entice a dog passing along the highway, and this I admit may happen. But if the owner of land have a right to game upon his land, and a right which he undoubtedly has, to a certain degree, whether a hare shall lie in one place or another, is that, which, generally speaking, he can neither cause or control, and being incident to the common and ordinary enjoyment of land, is that to which others must submit, incurring only the duty of restraining their dogs, which, in numberless instances I conceive, they are bound to do. But take it the other way; if a wilful trespasser, and to this the argument goes, may bring an action for loss or damage sustained by his own trespass, he may beat the cover of every man of landed property in the neighbourhood, and bring an action for his dog, if

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killed or maimed, in the way, at least, in which this case has been argued. Nor will it be any answer to say, that an action of trespass might be brought against him; for though the event of each action might be different as to damages, still in point of principle it leaves the objection the same. But here, again, I must ask, where is the line to be drawn? Suppose dog-spears planted at a distance from any road, in a preserve, surrounded on all sides by land belonging to the owner, and to an extent to render attractions or enticements impossible by the game lying in such preserve, will it be said that in such a case an action would lie? The argument, not indeed in words, but, unless I mistake it, in effect, goes to this extent. You may traverse field after field, add trespass to trespass, for the purpose of getting to insulated and protected property, turn in your dog, follow it yourself, and if one or the other be hurt, bring an action against the owner for the damage sustained. The argument, I say, proceeds to this extent; for though in this case the dog was endeavoured to be restrained, yet the doctrine goes to the general illegality of placing such spikes under any circumstances; nor has it been limited by the distinction between voluntary and involuntary trespass. With the greatest possible respect for the different opinions entertained, to this I cannot agree.

I have likewise attended to the argument, but in vain, to learn where, in cases of this description, the doctrine is to stop. Is it meant to be laid down, that no trap may be placed for the destruction of vermin of any description? for in every such trap, a dog may be maimed, if not killed; and if so, how does such a case differ from the present? If the owner may bring an action for one sort of injury, the consequence of trespass on his part, why not for another? if for killing by a dog spear, why not for maiming with a trap? The cases differ, not in kind, but in degree, and, on the ground taken in the argument, I do not see why every trap, for whatever purpose set, by which a dog may be killed or maimed, will not subject the owner of the land to an action; and traps are equally set against vermin, for the preservation of game, as appears, indeed, from the facts found by the present verdict.

Finding, then, no case in which any such action has ever been brought, nor any instance of an indictment for a nuisance, which this would be, if the argument for the Plaintiff be well founded in its extent, nor any precedent of such an indictment in any book,

book, though the practice, in various forms, is of extensive prevalence: thinking, too, that every analogy resorted to has failed; and that all principle is the other way, I am of opinion, on the general ground, that this action cannot be maintained, and I have been anxious to deliver my sentiments fully on this point, that I may not be thought to have declined it; though I think, at the same time, there is a narrower ground which would be of itself sufficient in favour of the Defendant.

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It is found by the special verdict that these spears were placed for the destruction of foxes, as well as dogs; the purpose, in both cases, being the preservation of hares. I have not heard it argued, that to destroy a fox is illegal, or that the argument of not shooting the dog, unless to preserve the hare, will apply to the case of a fox. A fox may be undoubtedly destroyed. In hares, every owner of land has a qualified property for the time being, in respect of their being on his land. In this all the cases agree. To preserve it by lawful means is a lawful purpose. Suppose, therefore, the special verdict had found that the spears had been placed for the destruction of foxes only, in order to save hares; would this become unlawful, because by possibility, and against the original intent, the death of a dog had been induced? or is it to depend upon intent? If so, a man has only to place such instruments and give no notice, and there will be no proof of intent: but it seems strange to say, that by giving notice he places himself in a worse situation, and this, though done by him in order to place others in a better, that is, in order to save their dogs, as a means, it is true, to save his own game. I have a right to kill a fox, and I intend to protect my game on my land by so doing; but because your dog may be killed, if found where he ought not to be, is my right therefore to cease? This seems to me extraordinary doctrine. Generally speaking, the party may justify by referring his act to any lawful cause, as in the case of *Crowther v. Ramsbottom and others* (a), in which it was held, and on the authority of many former cases, that in trespass for breaking and entering the Defendant's close, and taking his goods, the Defendant may justify under a sufficient legal process, if he had it in fact at the time, although he declared that he entered for another cause; and a case was cited by *Lawrence, J.*, in which *Holt, C. J.*, said, suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by

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(a) 7 Term Rep. 654.

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virtue of the legal one, for it is not what he declares, but the authority he has. In this case, the verdict finds that the spears were placed to kill foxes as well as dogs, which, taking it to be a lawful purpose, is one to which the original act, that is, placing the spears, may be referred. Being legal in one respect, can it become illegal by that which has been called in some case the turning up of the event? or, upon the doctrine of being taken to intend that which is a probable consequence, is a possible consequence to be inferred or intended in opposition to the primary and immediate intent, such intent being to avert the very consequence, as to which the particular intent is inferred? Every man is liable for the consequences of an act illegal in itself, but for the consequences of a legal act, such as placing spears for one purpose must be admitted to be, because a consequence follows, which, if it had been the single end and object (it may be taken, for the purpose of the argument in this stage of it), would have made the act illegal, that under such circumstances an action will lie, is that for which I cannot feel any principle, or discover any authority. At any rate, these are anomalies which greatly increase the difficulty, even on the former view of the subject, and add to my embarrassment in deciding for the Plaintiff.

[528] - The argument of inconvenience has been slightly touched. It is of fair application in a new and doubtful case; and consequences have been predicted of injury to the public and individuals from a decision in favour of the Defendant. Having already delivered my opinion too much at length on the case at large, I will only say, I feel no such alarm myself. The past is, in this respect, the best security for the future. Practices of this kind, various in their form, but similar in their object, have with notice to the public, long and extensively prevailed. Yet this is the first instance of an action having been brought. On the whole, I am of opinion that judgement ought to be for the Defendant.

GIBBS, C. J. I have reflected on this question repeatedly, and the respect due to my two learned Brothers who first delivered their opinions, would incline me strongly to concur with them; but after the fullest consideration, I feel myself obliged to say that I think this action cannot be maintained. No authority has been cited in support of it, no instance produced in which such an action has before been brought, nor have I heard any legal principle stated on which I think it can rest; and considering the case upon the general principles of law, I conceive, that as far,

far, at least, as civil rights are concerned, every man may guard his own land by any means he pleases, provided he does not thereby invade or interfere with the legal rights of others. One mode of guard is the setting up such defences as will render it dangerous for the animals of others to pass over our land, and if, after this, they endeavour to pass without right, it is at the peril of their masters, who do not keep then within their own bounds. What the Defendant has done, was on his own land, and could not molest any other man in the exercise of any legal right. I cannot think that he was bound to consider the degree of mischief which those guards, so set up on his own land, might occasion, either to beasts or dogs that wrongfully encroached upon him. The wrong is with those, whose dogs are permitted to wander into the Defendant's land, and if they suffer by such means as the Defendant has used for excluding or stopping all such aggressors, the fault is their own. The Defendant's act in laying the dog spears, was harmless, until the Plaintiff's dog wrongfully intruded upon him. The hurt which he received, is, therefore, to be referred to his own wrongful intrusion, which was the immediate cause of it. If the dog had no right to be there, as he certainly had not, his owner cannot complain that he was injured by the defences set up against all dogs in general. If the dog had a right to be there, then I admit that this action is maintainable; but, for the reasons which I have before given, and some which I shall have occasion to add in observing on one of the Plaintiff's arguments, I conceive it to be clear that he had not. I have put this case altogether upon the rights of the Defendant on his own land, without considering under what circumstances a man may acquire a title to game which he kills; because, if he has not a legal right to enter my land in pursuit of the game, as in this case he certainly had not, such considerations do not touch the present question. I know it is a rule of law, that I must occupy my own so as to do no harm to others; but it is their legal rights only, that I am bound not to disturb. Subject to this qualification, I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of wrongs, that I am bound to regard. Numberless instances might be stated, not in substance distinguishable from the present, in which men have uniformly acted upon this principle, without objection or question. I believe it never was doubted, that the owner of a several fishery, with the soil, might place hooks in the bed of the stream to destroy the nets of per-

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sons endeavouring unlawfully to fish in it, or that the occupier of a field may fix bushes thereon, as a guard against those who shall attempt, without his * leave, to draw nets over it for game. The immediate object in both these cases, is not to destroy the nets, but to prevent all persons from invading their neighbour's property, by the danger of destruction to their own. If they do invade it, the nets will as certainly be destroyed there, as the dog is here, and in both cases the consequences must equally rest with the owner. In point of strict right, there is no distinction between a dog and a net; both are personal property, and secured to the owner by the same rules of law. We naturally lament in all cases where an innocent animal suffers; but let it be remembered, that it is the voluntary act of his master which exposes him to this danger; and in the present case, I may add, after caution given to avoid it. It should also be observed, that the verdict states these dog-spears to have been planted for the destruction of foxes as well as dogs, and they are calculated equally for the destruction of both in their passage through the land. Now it certainly was one of the Defendant's rights, to destroy foxes on his own land, by this, or any other instrument of annoyance, and it does seem most extraordinary, to say, that he shall be restrained in his right of destroying foxes by this sort of instrument, lest dogs, which may come wrongfully on his land, should suffer by the same means. If it is true, as the Plaintiff must contend, that it was unlawful in me to set up these defences on my land, lest his dogs, pursuing game that way, should suffer by them, it follows that he must have a right to enter and remove them; for then they are an abateable nuisance. In other words he may himself justify a trespass on my land, to secure a safe passage for his dogs in their subsequent aggressions thereon. I cannot persuade myself that this is the law. I come next to the authority of decided cases. The only one which touches the present question, is that of *Blithe v. Topham*, which, in my opinion, is strong against the Plaintiff; but, before I observe upon it, I will state shortly in what cases an action of this nature is confessedly supportable, and upon what ground alone it can stand. If I divert a water-course from my neighbour's land, or corrupt it in its passage through mine, or erect a new building which obstructs the lights of his dwelling-house, I am liable, as has been truly said, to an action at his suit; because he had a right to the water-course and to the lights, and I have disturbed him in the enjoyment of those rights; but let me suppose the water-course

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does not flow out of my land into his, but goes off another way; and that after I have rendered the water unwholesome, his cattle escape into my land, without right, and suffer by drinking the corrupted water there. There is no pretence for saying that he can maintain an action against me; because he had no right in the water, nor had his cattle any right to come upon my land where they drank it; and the hurt which they suffered is referable solely to their own wrongful aggression. So it is here; if the dog had a right to enter the Defendant's land, the action would have been maintainable; but as he entered without right, the consequences rest with himself. If I dig a pit, or fix instruments of annoyance upon my land over which another has a right of common, or a right of way, or any other right, and his cattle, in the exercise of those rights, are thereby destroyed or damnified, he may unquestionably maintain an action against me for the injury which he suffers. But why? because in those cases his cattle had a right to be where they were, and received damage from my wrongful obstruction to the exercise of that right. Their right to be there is the *gist* of the action; and in no instance has such an action been supported, where the cattle had no right to be in the place in which they received the damage, unless the Defendant had used some undue means to entice them thither, as in *Townsend v. Wathen* (a), which stands upon a distinct ground: See 1 *Ro. Abr.* 88., where the cases in which such action lies are collected together. Here the dog had no right to be where he was, and the Defendant had a right to obstruct him; and, consequently, there is no pretence for supporting this case from analogy to any of those to which I have alluded. The case of *Blithe v. Topham*, which I mentioned before, was an action upon the case, brought against the Defendant, for digging pits on a common, whereby the Plaintiff's mare, straying thereon, fell into one of them, and died. There was a verdict for the Defendant, and the Plaintiff, to save his costs, moved in arrest of judgement, that the action could not be supported, because it did not appear that the Plaintiff's mare had any right to be on the common, and of that opinion was the whole Court, and it was adjudged that the bill should abate. An authority more directly in point against the Plaintiff in the principle upon which it was decided, can hardly be stated. The Defendant was there held not to be answerable for the damage done to the Plaintiff's mare, because the

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(a) 9 *East*, 277.

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mare had no right to be on the land where the pit, into which she fell, was dug; and, by the same rule, the present Defendant is not answerable for the damage done to the Plaintiff's dog, because the dog had no right to be where the dog-spear by which he suffered was planted. Since I heard my Brother *Dallas's* statement of the case put by Lord *Kenyon* in *Brock v. Copeland*, I have thought that that was also a strong authority against the Plaintiff. The Defendant in that case kept a mischievous bull in a close of his own, and the Plaintiff, crossing this close, was gored by the bull. It was further proved that the Defendant had acquiesced in the use of a way over his close, and that the Plaintiff was passing along such permitted way. Upon this ground, Lord *Kenyon*, and afterward the Court of King's Bench, held that the action was maintainable; because the Defendant had held out to the Plaintiff and the rest of the public, that they had a right of passage through his close, and having encouraged them to exercise the right, he must not annoy them in the act of using it. But for this, it was admitted, that the action could not be maintained; because, though the Defendant's bull was mischievous, the Plaintiff would have had no right to enter the close in which he was kept, and consequently would have had no just cause to complain of the hurt he received there. If the Plaintiff's dog had escaped into the close, and been gored by the bull, the consequence would have been the same: the Plaintiff would have had no ground of complaint, because his dog had no right to be where the bull was kept; and so it is here. And the true test, by which to try whether such an action as the present be maintainable or not, is, to ask, whether the man or animal that suffered, had or had not a right to be where he was when he received the hurt. I may add to this, that the absence of all authority and precedents for maintaining such an action, furnishes in itself the strongest argument against it.

Having stated the grounds upon which I think that this action cannot be maintained, either upon principle, or authority, I shall proceed to examine the reasoning by which the Plaintiff has endeavoured to support it, confining myself to the arguments used at the bar, upon which alone I think myself at liberty to observe.

First, It has been argued, that the Plaintiff having started this hare on ground over which he was permitted to sport, had a legal right to follow it, by himself and his dogs, over the land
[534] * of the Defendant, and would not himself have been a trespasser
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in so doing. If this position were law, the present action might certainly be supported upon the principles which I have before stated, because the Plaintiff's dog would then have a right to be where he was, and the Defendant would have had no right to obstruct him. But the law is clearly otherwise: the Plaintiff would in such case be clearly a trespasser himself, see *Sutton v. Moody (a)*, and his dog was at all events wrongfully upon the Defendant's land, whether the master was answerable in trespass for the act of his dog, or not.

Secondly, It has also been said, that because I could not justify killing or maiming dogs, which were found wandering over my land without right, therefore I cannot justify the setting up a defence which is likely to produce the same effect. But the two cases are widely different. In the one, I make an immediate and direct attack on the animals, with no object in view but their destruction, which I have no right to effect, if they can be removed from my land by less violent means; in the other, I merely set up a guard against all wrong doers generally; the primary object of this guard was protection to my own property, not mischief to theirs. The mischief produced was incidental, and arose entirely from their transgressing the bounds within which they ought to have been confined. To make any thing of this argument, and to found any certain rule upon it, it must be carried to the extent of proving that we can set up no defence for the protection of our houses or land, which is likely to produce more injury to aggressors, than we could legally inflict upon them, if caught in the act of aggression; for otherwise we shall be left without any rule at all. But such a proposition can never be supported. Almost every defence which we set up is of this description. A spiked gate to a field, or broken glass on a garden wall, will inflict wounds on men or animals who endeavour to break over them, which, if the owner of a field or garden found them therein, he would not be*justified in inflicting; yet it never was doubted, that such defences might lawfully be set up by every man in his own land, because general prevention, and not particular mischief, was his primary object.

Thirdly, Another ground taken in support of this action, was, that the owner of a dog is not answerable in trespass for aggressions committed by it against his will upon the land of others. Be it so; but this, as I have before observed, furnishes no argument against the land-owner's right to set up such guards as he

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(a) 1 *Ld. Raym.* 251.

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pleases upon his own land, against such aggressors. If I have no remedy against the owners of dogs that wrongfully break in upon my property, it is surely the more reasonable that I should be permitted to use effectual means for stopping them.

Fourthly, The want of a sufficient fence to keep dogs out of the Defendant's wood, has been urged against him, but this, as it regards the present case, is, I think, the fault of the Plaintiff, and not of the Defendant. The Defendant and Mr. *Townsend* have land adjoining to each other, not separated by any sufficient fence. Neither of them is bound to erect such a fence; but either of them may do it; and if Mr. *Townsend* chooses to sport upon his own land, with a dog too ungovernable to be prevented from wandering into the Defendant's, where he has no right to go, it is his business to set up a sufficient fence to prevent this, or he must take the consequence. I put this as the case of Mr. *Townsend* himself, because it is impossible that the Plaintiff, who acted only under his license, can be in a better situation than he would himself have stood in.

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Fifthly, It has been likewise urged in illustration of the doctrine contended for by the Plaintiff, that he who plants an instrument for destruction within the limits of his own ground, to deter trespassers from entering upon it, is criminally answerable for all the consequences that may ensue therefrom, and from hence it has been argued, that he must be civilly answerable for all damage occasioned thereby. I am by no means prepared to adopt this as a position which cannot be controverted, nor do I think, that, if established, it would necessarily lead to the conclusion which the Plaintiff would draw from it; but at all events, it presents a very different question from the present, and may turn upon very different considerations. It is enough to say at present, that this point has never been decided, and that the case now before us does not call for any decision upon it.

These are the arguments which have been produced in favour of the Plaintiff's action, and as they have failed in convincing me that it is supportable, I think for the reasons which I before stated, that there must be judgement for the Defendant; but as the Court is equally divided, regularly no judgement can be given. If, however, the Plaintiff thinks fit to avail himself of the suggestion of my brother *Burrough*, judgement may be entered for the Defendant, in order that the Plaintiff, if he shall be so disposed, may carry the matter further; if he shall not be disposed so to do, no judgement at all is to be entered.

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May 19.

VAUGHAN, Serjt., had obtained a rule *nisi*, to set aside the writ of *feri facias* which had issued in this case, for irregularity, with costs, upon an affidavit that final judgement was signed on the 14th of May, and that a writ of error had been previously sued out and allowed on the 2d of May, and that the allowance thereof was served the same day on the Plaintiff's attorney. Best, Serjt., showed cause, upon an affidavit, that the Defendant, in Nov. last, called on the Plaintiff, and offered to pay 37*l.* in full satisfaction of debt and costs, which being refused, the Defendant told the Plaintiff, that if he did not accept the terms he then proposed, he should never have any thing, that he would put the Plaintiff to all the expense he could, and at last would bring a writ of error, and keep him out of his money a twelvemonth. Best referred to *Spooner v. Garland* (a), *Hawkins v. Snuggs* (b), *Turnell v. Dickinson* (c).

A threat of bringing a writ of error for delay, uttered six months before the writ of error sued out, held not sufficient to entitle the Plaintiff below to execution pending the writ of error.

Vaughan supported his rule.

GIBBS, C. J. If there be an express declaration that a writ of error be brought for delay, on affidavit of that fact the writ of error hath often been superseded. But in all the cases the declaration has been made after judgement has been signed, and just when the writ of error has been sued out. In *Spooner v. Garland*, the Defendant's attorney proposed to give a *cognovit*, and said, "If you do not accept it, I must bring a writ of error." All these cases are more direct in the proof that error is brought for delay, than the affidavit in the present case is. This is a declaration that the Defendant would put the Plaintiff to all the expense he could and keep him out of his money for a twelvemonth; but it is made in an early stage of the proceedings; and I think it is not so strong and distinct as in those cases: the rule therefore ought to be made absolute, but without costs.

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(a) 2 Maule & Selw. 474.

(b) *Ibid.* 476.(c) *Trin. term*, 1792.

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Bond reciting a marriage intended, and the wife's present and expectant property, and that in consideration thereof, and of love, and to make a provision for the wife and issue of the marriage, in case it should take effect, the husband had agreed to pay a sum to trustees, and also had agreed, that if at any time during his natural life he should be seised of any hereditaments in possession, he would by such conveyances as counsel should advise, settle the same on the wife and issue of the marriage, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her, in case she should survive; and the condition was for payment of the sum to trustees, and also, that if the obligor should during life become seised of hereditaments, he should settle the same upon the wife and issue of the marriage, as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her, in case she should survive the obligor. The husband had issue, survived the wife, and afterwards acquired lands, but made no settlement thereof on the issue. Held that the bond was not forfeited.

THIS was a case ordered by the Lord Chancellor to be made, for the opinion of the judges of this Court. By a bond dated 10th August 1768, *John Prebble*, deceased, became bound to *Hans Sloane* and *John Tilden* in 2000*l.*, with condition, which recited that a marriage was intended between the obligor and *Mary Townsend*, and that the obligor was to receive on the marriage with her 200*l.*, and that she being likewise possessed of, or entitled unto a very considerable share, or moiety, of the personal estate which was of *T. Townsend* her late father, which, immediately after the decease of her mother, *Mary Townsend* the elder, would come to her the daughter, and that in * consideration thereof, and of the love which the obligor bore towards her, his intended wife, and for making a provision for her, and the issue of the intended marriage, in case the marriage should take effect, the obligor had agreed, not only to pay such sums of money, to such persons, and at such times as were thereafter expressed: but had also agreed, that if at any time during his natural life, he should be seised of any messuage, tenements, lands, and hereditaments in possession, that he would by such good conveyances in the law as counsel should advise, settle the same upon the said *Mary Townsend*, and the issue of the marriage, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her, in case she should survive the obligor. And the condition was, that if the marriage should take effect, and *M. Townsend* should survive the obligor, then if the heirs, executors, administrators, or assigns of the obligor, should within three months next after his decease pay to the obligees, their executors, administrators, and assigns 1000*l.*; in trust, and for the only use and benefit of *Mary Townsend*, her executors, administrators, and assigns, to be by her and them peaceably and quietly held and enjoyed, and to be disposed of to her and their own proper use, and uses for ever; and also if the marriage should take effect, and the obligor should survive his wife, and there should be any child or children of her by him begotten, living at the time of his decease, then if the obligor's

heirs,

heirs, executors, administrators, or assigns, paid to the obligees, their executors, &c. 1000*l.*; in trust, nevertheless, and to the intent to pay and dispose of the same unto and amongst all and every the son and sons, daughter and daughters of *M. Townsend* by the obligor, in equal shares and proportions, if there should be more than one, and if but one, then wholly to that one, at their respective age or ages of twenty-one years, and in the meantime to apply the interest arising from that sum for the sole use and benefit of such son and sons, daughter and daughters, equally, if more than one, and if but one, then wholly to the use and behoof of that one; and further, if the marriage should take effect, and the obligor should at any time during his natural life become seized of any messuage, tenements, lands, and hereditaments in possession, and should settle the same upon *M. Townsend*, and the issue of the marriage by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her, in case she should survive the obligor, then the bond to be void. The marriage was solemnized, and the Plaintiffs were the issue thereof, who are all now living, and of full age. *Mary Prebble*, formerly *M. Townsend*, died in 1775, and the obligor did not become seized of any messuage, tenements, lands, and hereditaments, in possession, during the continuance of his marriage with her. After her death, the obligor, in 1782, married the Defendant *Ann Prebble*, and had issue several children of the second marriage, who were now living, and after the second marriage, and not before, he became seized of an estate called *Black Acre*, in possession. The question, therefore, for the opinion of this Court was, whether, according to the intent of the condition of the bond, the obligor would commit a breach of such condition, if he did not make a settlement of *Black Acre* upon the issue of the first marriage.

Best, Serjt., for the Plaintiffs, contended that the manifested intent of the instrument was to make provision not merely for the wife, but also for the children of the first marriage; a settlement intended to provide for the wife, and not for the children, was never yet seen. The instrument must be taken most strongly against the obligor; and if ever any estate came to him in his life, he was bound to settle it on his children. The words are "the better to make provision for the said *Mary*, in case she should survive the obligor"; these are the only words showing an intent that the provision should be restricted to the wife.

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wife. These words do not make it a condition precedent to the making of any settlement, that the wife should outlive the husband before any property should be purchased, but they only regulate what shall be the limitations of the property, to take effect in that event. The bond recites an intent to make provision, not only for the wife, but for the issue of the marriage, and an agreement to settle his after-purchased estates upon the wife and the issue of the marriage, in such parts and proportions (and though the expression is obscure, yet it is material) as should be thought requisite, the better to make a provision for her the said *Mary Townsend*. The meaning is, that a part shall be settled for making a provision for her, on her husband's decease; the residue shall be settled on her issue. If all had been destined for the wife, there would have been no need of dividing this property into parts and proportions, nor any need of a plurality of uses: one use, declared for her, would have sufficed. Therefore a part only is to be settled on her, and the use thereof is to be declared for her; the residue is to be settled upon the children, and the uses thereof are to be declared for them. If the words "the better to make a provision for her" are to over-ride the whole instrument, then all the words, "shares and proportions", and the repeated mention of the "issue" must be struck out, as having no meaning or effect. The proposed construction gives effect to every part of the deed. Other parts of the bond aid this construction. If the wife survives the husband, the 1000*l.* is to be at the wife's disposal; the parties thinking it better that she should have an absolute power, and should divide among the children as she would; but if she dies, living her husband, it is to be paid to the trustees for the children.

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Blosset, Serjt., for the children of the second marriage, called the attention of the Court, first, to the situation of the parties; next, to the nature of the instrument; and lastly, to the terms in which it was drawn up. The parties were about to enter into a marriage-settlement. It is not only improbable, but even inconceivable, that a husband should agree to tie up, not only all that he then had, and all that should descend or accrue to him during coverture, but all that should come to him after his marriage with a second wife, and all that he might purchase after his first wife's decease. A bond, if it contains terms for the advantage of the obligor, is to be construed most beneficially for him, and not adversely. It is said, the penalty of this bond

is

is 2000*l.*, the double of 1000*l.*, which is to be settled on the wife if she survives, and on her issue if the husband survives. No doubt it was the intent of the parties to provide for the issue of the marriage: the only question is, out of what fund were they to be provided for, whether out of all the property that should descend to the husband during his life, to the disherison of all his future issue, or only all that should descend to him during that marriage. The property which this lady brought was extremely small, only 200*l.* The bond further recites, that the wife would be entitled to a considerable share of the personal property of her father, which would come to her after her mother's decease. This money would become beneficial to the husband only in case of its falling into possession during the coverture. For though it probably was a vested interest in the wife, yet nevertheless, unless it fell into possession during the coverture, the husband could not dispose of it. On the face of the case it is to be intended, that this interest could not be disposed of by the husband, unless it vested in the wife in possession, during the coverture, and so far as that expected property extends, the argument of reciprocity arises. A circumstance in favour of the Defendants, is the provision respecting the 1000*l.*, that if the husband survives, it shall be settled on the issue; if the wife, then on her only. This shows that the intended provision for the issue is satisfied without settling property acquired after the wife's decease. Though the Plaintiffs are correct in contending that *Mary Townsend* is the principal object of this provision, yet it is an unwarranted assumption to say, that she can have any benefit from such property as shall fall to him after her decease. The contingency of the husband surviving the wife, and the contingency of the wife surviving the husband, are both distinctly mentioned in the limitations of the 1000*l.* They also are both mentioned with equal distinctness as to the future acquired estates, by the words, "the better to make a provision for her, in case she should survive the obligor." It is not contended that if *Mary Townsend* had lived, the settlement of the husband's future property should be confined to her, and not have extended to her issue. The words "during his natural life" show that no lands were to be settled to these purposes, but such as should descend during the joint lives of the obligor and his wife, and could be settled at once upon both objects, the wife and the children. That becoming

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impossible by the act of God, the bond is discharged. The doctrine of a performance *cy pres* is unknown in a court of law.

Best, in reply. The provision in question only applies to one part of the husband's property, namely, his real, not his personal estate. He therefore after the marriage had a power of preventing more property from being settled than he thought reasonable, by abstaining from purchasing it. The probability is less, that he should leave the issue totally unprovided for, than that he, receiving 200*l.*, which to him might be a considerable property, and the chance of more, should intend, in case of his wife dying, to make no provision at all for his children. The intent was, to settle the real estate for the benefit of his children; and, therefore, as no settlement has been made, the bond is forfeited. No authority is cited for the proposition, that where the condition of a bond contains a stipulation introduced for the benefit of the obligor, it shall be construed most favourably to him. This is in substance a covenant, and a covenant must be taken most strongly against the covenantor. It is next said, that the wife's fortune is extremely small; but neither a court of law, or of equity, can measure the equality of fortunes. Marriage itself is a sufficient consideration for any settlement. But the husband might have reduced the wife's expectant interests into possession, either by selling it, as a reversion, or by awaiting the chance himself. It is said to be clear, that *Mary Townsend* is the entire object. It is proposed on the part of the Defendants to satisfy the words shares and proportions, by settling part of the property on the wife, and part on the children. This admission removes all doubt: for if, in the event of the wife surviving, the whole estate is not to be settled on her for life, with remainder to her children, but if a part only is to be settled on the wife, and a part on the children, does not this show that the making provision for the wife for her life, is only a part of the mode of making a settlement, and that the issue are as much the care of the obligor as the wife? It shows that a provision must be made for the wife, if living, but if dead, and that part of the obligation cannot be satisfied, then the settlement must be made on the issue. In what limitations or of what quantity that settlement shall be made, is not for this Court, but for a court of equity to decide. The only question for this Court is, has the obligor, by settling nothing, broken the condition of his bond?

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The following certificate was afterwards sent to the Court of Chancery.

WE have heard this case argued: We have considered it and are of opinion, that according to the true intent and meaning of the condition of the said bond, the said *John Prebble* having survived the said *Mary Prebble*, formerly *Mary Townsend*, would not commit a breach of such condition if he did not make a settlement of the estate called *Black Acre* upon the said issue of the said first marriage.

V. GIBBS.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

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The ATTORNEY-GENERAL, at the Relation of CLARKE and Another, v. The Mayor, Jurats, and Commonalty of the Ancient Town of RYE, and Others.

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THIS was a case directed by the Master of the Rolls to be laid before this Court. There is, and, long before 1708, there hath been, in the county of *Sussex*, an ancient town incorporated by the name of the *Mayor*, Jurats, and Commonalty of the ancient town of *Rye*. *James Saunders*, by his will, dated 7th January, 1708, duly executed and attested, so as to pass real estates, devised certain lands and premises in *Orney, Kent*, to the Right Worshipful the Mayor, Jurats, and Town Council of the ancient town of *Rye*, for the time being, and their successors for ever, upon the several trusts, uses, and considerations, and by, and under such restrictions, as in that will was afterwards directed, limited, and appointed, and to and for no other use, intent, and employment whatsoever, that is to say, upon trust, that the said mayor, jurats, and town council, for the time being, or the major part of them, should and would provide a good convenient school in the ancient town of *Rye*, and should also provide a good, sober, and discreet schoolmaster, who should teach and instruct the poor children of the town to read in *English*, and write, to cast accounts, and to teach and instruct them in the art of navigation (*gratis*), so as they did not exceed the number of seventy at any one time; and that the said children should be sent by nomination of the mayor, jurats, and town

The mayor, jurats, and commonalty of the ancient town of *Rye*, were held to take lands by a devise to the Right Worshipful the Mayor, Jurats, and Town Council of the ancient Town of *Rye*.

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council, and upon further trust that the school should be continued in the town of *Rye* for ever thereafter. And the testator directed that the yearly rents, &c., of the messuages, &c. *should be from time to time, for ever, received by the mayor, jurats, and town council for the time being, and should be by them paid quarterly to the schoolmaster for his service therein, so as the rent of the school should be thereout first deducted and paid, and that the mayor, jurats, and town council should be for ever the governors of the school, and that they, or the majority, should have the nomination of such schoolmaster, and power to remove him upon neglect or insufficiency, but should within three months next after the death or removal of any schoolmaster appoint another sober and discreet person, fit for such an employ, and he gave power to make bye orders or rules, not contradictory of this intent; and further, that the mayor, jurats, and town council should yearly for ever be accountable for their trust to the right worshipful the mayor, jurats, and town council of the town and port of *Hastings*; and that, upon stating such accounts, if the governors of the charity school of the ancient town of *Rye* should be found to abuse or misapply the charity they should from themselves forfeit the estate and premises so settled upon them, unto the mayor, jurats, and town council of the town and port of *Hastings* for the time being, upon due proof of misapplication thereof. And if thereafter either the town of *Hastings* or *Rye*, should cease to be a town corporate, then the testator thereby appointed in the stead of the mayor, jurats, and town council of both or either of the said towns, as should so cease to be a corporation, the worshipful the justices of the peace for the time being of the county of *Sussex*, residing within *Hastings* rape, to be from thenceforth the governors of the several charities of the towns by him given; and he thereby gave to the said justices the same power and authority, and under the same trusts as was therein before mentioned. There is no corporation called by the name of the mayor, jurats, and town council of the ancient town of *Rye*, nor is there any town council in the said town.

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The question for the opinion of the Court was, whether any and what estate or interest passed under that devise to the mayor, jurats, and commonalty of the town of *Rye*, or to any and what person or persons, body or bodies corporate?

Blosset, Serjt., for the Defendant, argued that there being but one incorporation, it sufficiently appeared on this will to be the intent of the testator to leave his land to this incorporation, notwithstanding

withstanding the mistake of his using the word town council instead of the word commonalty. In the *Chancellor of Oxford's* case (a) it is laid down that a will and an act of parliament are to be expounded alike, for *parliamentum, testamentum, et arbitramentum* are to be expounded according to the minds and intentions of those who are parties to them. This description, however, would have sufficed even in a deed (b). *Mayor of King's Lynn's* case (c). A devise was intended to be *majori et burgen-sibus burgi domini regis de Lynne Regis*; the words *burgi domini regis* were left out, but the devise was held good, and the Court concluded that it would be reasonable to drive him who would avoid a writing, demise, grant, &c., made by a corporation, or to it, by reason of any verbal or literal misnomer, to show that there are two corporations in the same city, borough, town, &c., one by the true name, and another by such name as is contained in the deed, &c., and to have the deed, &c., good by or to one of them. But when, in truth, there is but one and the same corporation, leases, grants, &c., made by them or to them ought not to be avoided by such nice and verbal variances, when in substance the true name of the corporation, either by matter expressed or necessarily implied in the words themselves, appears to the Court. So, *D'Ayrey's* case (d), *præpositus et scholares aulae scholarium reginae de Oxon.*; and they presented by the name of *præpositus collegii reginae in universitate Oxoniae, et socii et scholares ejusdem collegii*, and confirmed the demise of their presentee *per nomen præpositi, sociorum, et scholarium, aulae, vel collegii reginae, in universitate Oxon.* And it was resolved, that as well the confirmation, as the presentation, was good enough, and it is said that names were invented to make a distinction between person and person, and a grant to our sovereign Lord *James* would be good, though the king is a corporation. So, if a bond be made by the name of *J. C., clericus de D.*, although *J. C.* be the abbot of *D.* the grant was good. But farther there is not even a misnomer; for *Dr. Brady*, in his history of burghs, shows that *communitas*, or commonalty, means the town council, and not the inferior burgesses, a strong authority, if the Court can decide this case upon that point. But the main question is, what the intent of the testator was; and, no doubt, he meant to leave his land to the town of *Rye*. It is clear that he meant to leave it to persons in the town of *Rye*, to persons then incorporated,

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(a) 10 Co. 57. b. (b) *Dalison*, 78. *Owen*, 35. (c) 10 Co. 122, b. (d) 11 Co. 18. b.

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and to persons who could perpetuate themselves. There is a provision that if the town should cease to be a town corporate, the land should go over. It is impossible to imagine that the testator intended to leave it to an integrant part of the corporation, or to less than the whole, for no integrant part is capable to take.

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Copley, Serjt., contra. The testator has devised this estate to the governing part of the corporation, a devise which the rules of law do not permit to take effect, not to the mayor, jurats, and freemen at large, who form the commonalty. The intent was the erection, government, and management of a school, but in case the devisees should be dissolved, the testator gives to the justices of the borough, a body clearly unable to take; and therefore he may probably have intended in the first instance to give to another description of parties, who cannot take. The argument, therefore, which would arise from the incapacity of the first body to take, has no place here; besides, it does not follow from the circumstance of the testator looking to the dissolution of the corporation, that he contemplated the gift to the whole, for if he gave the land to an integrant part, and if the corporation be dissolved, its dissolution would equally destroy the devisees. It is more likely that the testator meant to invest these powers in a select body than in the whole corporation. And as the partial devisees cannot take, the land must descend to the heir at law.

GIBBS, C. J. This case has been brought to the only point, viz. the testator's intent. The cases cited by the counsel for the Defendant show, that if an intent appears to give to the corporation of *Rye*, they shall take, though ill-named. I agree with my Brother *Copley*, that if the intent appears to give to a part of the corporation, although that intent fails of effect, the whole corporation cannot take. But it is too much to infer, that the testator meant by the town council a body which does not exist, rather than to infer that the use of these words arose from the misapprehension of their effect by the testator himself. We think that an intent does appear to give to a body which could hold in perpetuity, and to give to a corporation: there is this corporation, and there is no other corporation of any similar description; and we therefore think the mayor and corporation of *Rye* are entitled to recover.

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The following certificate was afterwards sent to the Master of the Rolls:

WE

WE have heard this case argued. We have considered it, and are of opinion, that under the said devise an estate in fee passed to the mayor, jurats, and commonalty of the said ancient town of *Rye* and their successors.

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In consequence of the fraud which had, in the case of *Locke v. Craddock* (a), been endeavoured to be practised by means of a forgery in the rule for the writ of *supersedeas*, the Court thought it proper to make a new rule on that subject.

REGULA GENERALIS.

IT IS ORDERED, that hereafter all rules and orders for *supersedeas* to discharge Defendants out of the custody of the warden of the *Fleet*, or other custody, shall be filed with the prothonotaries of the Court, upon their signing the writ of *supersedeas*.

(a) *Ante*, 437.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

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IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS,

IN

TRINITY TERM,

In the Fifty-seventh Year of the Reign of GEORGE III.

DOE, on demise of DELL, v. PIGOTT.

June 7.

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IN ejectment for a close called *Taynter-field*, tried at the *Essex* spring assizes, 1817, before *Bosanquet*, Serjt., the Plaintiff claimed under the will, of *Jane Lyon*, dated 1st *May*, 1779, duly executed and attested, whereby she devised “all her freehold and copyhold estates, situate in or near *Latchingdon* near *Maldon*, in the county of *Essex*, and also all and singular her *freehold and copyhold estates, at or near *Palepit* in the same county; which last-mentioned estates then or lately were in the occupation of *Lawrence Parsley* and ——— *Thomas*, widow, with their appurtenances, to *Charles Mackay*, Esquire, and *Robert Makepeace*, silver-smith, and their heirs, to the uses thereafter expressed (that is to say), as to, for, and concerning all her said estates in or near *Latchingdon*, with the appurtenances, to the use of her sister *Margaret*, wife of *Alexander Mackay*, and her assigns, for life, for her sole benefit, with remainders over; and

I devise all my freehold and copyhold estates situated in or near *Latchingdon* near *Maldon*; and also all and singular my freehold and copyhold estates at or near *Palepit* in the same county, which last-mentioned estates are now or lately were in the occupation of *Lawrence Parsley* and ——— *Thomas*, widow. The testatrix had a freehold close in

the parish of *St. Peter's, Maldon*, near to a principal street of *Maldon*, distant, from three and a half, to six and a half miles from her principal estate at *Latchingdon*, and intercepted from it by parts of three parishes. She had a freehold close in *Steeple*, distant two and a half miles from *Latchingdon*, and nine from *Maldon*. She had copyhold lands in *Latchingdon*, and the will of an ancestor spoke of lands both freehold and copyhold in *Latchingdon*. Held that the freehold close in *St. Peter's, Maldon*, did not pass by this devise.

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as to all and singular other her said freehold and copyhold estates, at or near *Palepit* aforesaid, then or late in the occupation of *Lawrence Parsley* and ——— *Thomas*, widow, with the appurtenances, to the use of the testatrix's sister *Isabella*, the wife of *John Purnell*, and her assigns for life, for her sole benefit; and as to all her said estates beforementioned, as well those at or near *Latchingdon*, as those at or near *Palepit* aforesaid, with their respective appurtenances, from and after the determination of the several estates thereinbefore limited concerning the same respectively, to the use of her nephew *John Solley Purnell*, and his assigns for life; with remainder to trustees, in trust to preserve the contingent uses and estates; with remainder to the use and uses of all and every the child and children of the body of her said nephew *John Solley Purnell*, and of the several and respective heirs of their body and bodies, as tenants in common, with benefit of survivorship; and the testatrix devised and bequeathed to her sister, *Margaret Mackay*, her heirs, executors, administrators, and assigns, one moiety of the residue of her estates, both real and personal; and the other moiety thereof she devised and bequeathed unto the said *Charles Mackay* and *Robert Makepeace*, their heirs, executors, and administrators, in trust for the separate use and benefit of her said sister *Isabella Purnell*, her heirs, executors, administrators, and assigns. The testatrix and Mrs. *Mackay*, who survived her, were both now dead; the Defendant claimed under a conveyance by fine from the devisee in remainder, *John Solley Purnell*. The Plaintiff's lessor was the only daughter of the latter, who was the only son of *Isabella Purnell*. It was proved on behalf of the Plaintiff that *Taynter-field* lay out of the town of *Maldon*, in the road to *Latchingdon*, beyond all the houses of *Maldon*, but it was situate in the parish of *St. Peter's* in *Maldon*. The Plaintiff's witnesses stated that the boundary of *Latchingdon* parish, nearest to the field in question, was distant from it three miles and a half, the parish of *Mundon* lying between them; that the testatrix died seised of a freehold field in the parish of *Steeple*, which was distant only two miles and a half from the boundary of *Latchingdon*, the parish of *Mayland* lying between them; that *Steeple* was nine miles from *Maldon*; that the estates at *Palepit* and *Latchingdon*, were all copyhold, and that the land at *Steeple* and *Taynter-field* were freehold; that the buildings in *Maldon* had of late years been greatly extended. The lessor of the Plaintiff also put in evidence a settlement made previous to the marriage of *William*

Lyon

Lyon with the testatrix, which recited that *John Solley* had in *January, 1755*, devised a customary messuage called *Palepit*, in the parishes of *Cold Norton* and *Purleigh*, and a customary messuage called *Goodhare's*, with the lands both freehold and copyhold, in the parish of *Latchingdon*, and all that the testator's close called *Taynter-field*, in the parish of *St. Peter, Maldon*, in the county of *Essex*, in the occupation of *James Bridge*, and all that messuage called *Gardiner's*, with five acres of land in the parish of *Steeple*, then in occupation of *Richard Thomas*, to *Jane Solley* in fee. For the Defendant it was deposed, that *Taynter-field* lay very near to the back of the houses of the principal street of *Maldon*, and that it was distant from *Latchingdon* six miles and a half. And that three parishes, *St. Mary in Maldon*, *Mundon*, and *Purleigh*, intervened. The premises had been occupied by a tenant named *Coe*, who had paid rent to the testatrix. It was urged for the Defendant that the land in *Steeple* satisfied the description in the will, of freehold land in or near *Latchingdon* near *Maldon*, and that inasmuch as therefore no necessity required such a forced interpretation as would include *Taynter-field*, that land, which was not near, but in *Maldon*, would not pass by this description. The jury found a verdict for the Plaintiff, with liberty to move to enter a nonsuit.

Onslow, Serjt., in *Easter* term, accordingly obtained a rule nisi to set aside this verdict and enter a nonsuit; against which

Lens, and *Best*, Serjts., in the same term, showed cause. They contended that the present apparent contiguity of the premises to *Maldon*, the buildings of which town had of late years been extended to the land in question, so as almost to include it in the town itself, was to be laid out of the case; for forty years since, when the testatrix made her will, she, who did not reside on the spot, might not know the premises to be situate in any parish of *Maldon*, and therefore might well intend to comprize them in her devise, by this description. She does not profess to state in what parish the land is situated. As the principal estate of the testatrix was situate at *Latchingdon*, it was natural that she should describe all the out-lying parcels with reference to that place.

Onslow and *Copley*, Serjts., in this term, in support of the rule, referred to *Doe, on demise of Harris, v. Greathed (a)*, which they said was less strong than this case. It might as well be contended

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(a) 8 East, 91.

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that a devise of all lands in or near *Hampstead* near *London*, would include a messuage in *St. Paul's Church-Yard*. It appeared by the recited will of *John Solley*, that there was sufficient land, both freehold and copyhold, in *Latchingdon*, to satisfy the whole description contained in this devise, and it was therefore not required that *Taynter-field* should thereby pass for that purpose. The title of the heir must consequently prevail.

GIBBS, C. J. This was an ejectment brought for a certain close or closes of land called *Taynter-field*, and the question is, whether it passed under the former part of the will of Mrs. *Lyon*, or remained undisposed of, subject only to the residuary clause. The lessor of the Plaintiff is to show that it passed under the former legatory part of the will. It appears from the evidence that these closes are situate at least four, and some witnesses say six, miles from *Latchingdon*, and do not answer the description of being near *Maldon*, but are in *Maldon*. The first description of the property in the will, is "in or near *Latchingdon*," this is not in, nor is it near *Latchingdon*. The next part of the description states it to be near *Maldon*: but this property is shown to be in *Maldon*. It is not enough for the lessor of the plaintiff to throw doubt on the case, he must show with certainty that it was plainly intended that the premises should pass: I cannot say that in the present case it is so shown, and therefore I think that there ought to be a nonsuit.

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DALLAS, J. The will says, "near *Latchingdon*;" this is not in or near *Latchingdon*.

PARK and BURROUGH, Js., concurred in making the

Rule Absolute.

June 9.

GALL v. COMBER.

The vendor of goods through the medium of a broker who has a commission *del credere*, cannot recover the price from the broker in a declaration upon an *indebitatus assumpsit* for goods by the Plaintiff to the Defendant delivered to be sold, and by him sold.

THE Plaintiff declared in *indebitatus assumpsit* in respect of divers large quantities of silk, by the Plaintiff delivered to the Defendant, as the agent of and for the Plaintiff, at the Defendant's request, to be sold, and which were accordingly by him sold. Upon the trial of the cause, at *Guildhall*, at the sittings after *Easter* term, 1817, before Gibbs, C. J., it was proved that the Plaintiff had employed the Defendant to sell raw silk for him upon a *del credere* commission of 2½ per cent., and had

sold

sold the silk, and had accordingly charged the 2½ per cent., for guaranteeing to the Plaintiff the payment of the price. *Gibbs*, C. J., thought that this was merely a contract that if the purchaser did not pay, the Defendant would guarantee the price, and that the declaration was not descriptive of that contract, stating merely a claim for the proceeds of the goods sold, and he nonsuited the Plaintiff.

Best now moved to set aside the nonsuit, and have a new trial, contending, upon the authorities of the *dictum* of *Buller, J.*, in *Grove v. Dubois* (a), and of *Bize v. Dickason* (b), (in which the Court is reported to have confirmed the principle of the former case,) that a commission *del credere* is a contract in its nature altogether distinct from any other contract of guaranty, and that it was not necessary to declare thereon as on a guaranty, but that the action might be maintained against the broker in the first instance, without previously resorting to the principal purchaser, or averring his default: if a commission *del credere* were a contract of guaranty, nearly all commissions *del credere* would be void for want of a note in writing.

The Court gave no opinion upon this *vexata quæstio* (c), further than to observe that in *Bize v. Dickason* the doctrine was not stated nor argued on, which was asserted in *Grove v. Dubois*; but even if the Plaintiff could establish his point, that he who guarantees the payment for goods sold, is liable in the first instance, this declaration would not suffice, for the contract was a contract *sui generis*, and the Defendant was indebted, not, as it was here stated, in consequence of his having sold the goods, but in consequence of his having agreed, that when he had sold them, he would see the price paid for them, which was not the undertaking here stated; and they refused as well this application, as also *Best's* prayer for permission to amend his declaration in this stage of the cause.

(a) 1 Term Rep. 112.

(b) 1 Term Rep. 285.

(c) See *Peele v. Northcote*, ante, VII. 478.

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BIRD v. DALE.

Before game in the hands of an unqualified person can be seized within a manor for the use of the lord or lady of the manor, the lord or lady must exercise his or her judgement on the specific case, whether the person possessing the game is or is not unqualified.

But after such judgement exercised, the lord or lady may take the game by the hands of another.

In trespass for taking hares, where the Defendant justified seizing them by command of the lord of the manor, and for his use, within the manor, the hares being found in the possession of an unqualified person, and the Plaintiff traversed the command, held that the command to be proved, to maintain the issue, must be such a command as would legally authorize the seizure; and that evidence of a wrongful command would not maintain the issue.

THE Plaintiff declared that the Defendant, with force and arms, &c. to wit, at *Chelmsford*, seized, took, and carried away three dead hares, and three baskets of the Plaintiff, and converted and disposed of them to his own use. The Defendant pleaded, 1st, not guilty; 2dly, as to the seizing, taking, and carrying away of the three dead hares, that before and at the time when the Reverend *P. Beauvoir*, clerk, was seized in fee of and in the manor of *Downham*, and that the three dead hares at the time when, &c. were found in the possession and custody of *James Britten*, at a place called the *Ware Farm*, within the manor of *Downham*, *Britten* then being the servant of the Plaintiff, and neither the Plaintiff nor *Britten* at the time when, &c. having lands or tenements, or any estate of inheritance, in his own or his wife's right, of the clear yearly value of 100*l.* or for term of life, or any lease or leases of 99 years, or other longer term, of the clear yearly value of 150*l.* nor either of them being heir or heirs apparent to an esquire or other person of higher degree, nor the owner or owners, or keeper or keepers of any forest, park, chase or warren, stocked with deer or conies, for their or either of their necessary use, or in anywise qualified, empowered, or authorized by law to take, kill, or destroy, or to have in either of their possession, any sort of game; and that at the time when, &c. *P. Beauvoir* * being so lord of the manor of *Downham*, and the Plaintiff and *Britten* being persons not qualified to kill game, and *Britten* so having in his possession, within the manor, those dead hares, being of the game of this realm, the defendant at the time when &c., as the servant of *P. Beauvoir*, and by his command (he, *Beauvoir*, then being such lord of the manor), did take away from *Britten* the three dead hares, he not being a person qualified to kill game, or then have the game in his possession, for the proper use of *P. Beauvoir*, as was lawful, and traverses the taking, at *Chelmsford*, or elsewhere, out of the manor of *Downham*. Secondly, for plea as to the seizing, taking, and carrying away the baskets, he pleaded as in the second plea, and averred the taking by *Beauvoir*'s command; adding, that *Britten* had in his possession the three dead hares enclosed and fastened up in those baskets; and that because those hares were so fastened up in

in the baskets, and could not be taken out without taking and opening the same for that purpose, the Defendant necessarily took the baskets for the purpose of taking from the same those three dead hares so fastened up therein, for a short time, and did open the baskets for that purpose, doing no damage thereto, and took out from them the hares, and afterwards immediately, and before the commencement of this suit, restored to the Plaintiff the baskets, and left the same at the Plaintiff's dwelling-house, as he lawfully might; and traversed the taking of the baskets at *Chelmsford*, or elsewhere out of the manor of *Downham*, or otherwise than as aforesaid. Fourthly, as to taking the hares and the baskets, after pleading as in the second plea, he pleaded that at the time when, &c. the three dead hares were enclosed in the baskets, and which baskets and the hares contained in them were directed to be carried and delivered to certain persons mentioned in certain directions on the hares, and which baskets containing those dead hares, enclosed and directed as aforesaid, were found in *Britten's* custody, at a place called the *Ware Farm*, within the manor of *Downham*, *Britten* then being the carrier of the same, and not being a person qualified by law to kill or then to have in his possession any game; and that the Defendant as *Beauvoir's* servant, and by his command, at the time when, &c. took away from *Britten* those three hares for *Beauvoir's* proper use, being lord; but by reason of their being so packed, enclosed, and sewed up, they could not be so taken away without taking them out of the baskets, the Defendant, for that purpose, and to enable him to take away the hares, necessarily took the baskets with the hares into his possession for a short time, and until he could take out the hares, and having so done, re-delivered the baskets to the Plaintiff, and left them at his dwelling-house, as he lawfully might, and he traversed the taking out of the manor of *Downham*. The Plaintiff joined issue on the 1st plea; and to each of the three other pleas he replied, that the Defendant by his own wrong, and not as the servant or by the command of *P. Beauvoir*, committed those trespasses. The Defendant joined issue on these traverses. This cause was tried at the *Essex Lent* assizes, 1817, before *Bosanquet*, Serjt. It was proved that the Defendant seized the hares within the manor: he did not demand them for Mr. *Beauvoir*, nor mention his name. It was admitted by the Defendant's counsel, that they could not prove a specific authority to seize those particular hares, but they said they were prepared to prove that

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that the Defendant had, besides the deputation of the manor, general directions to seize all hares that were seen in the possession of the plaintiff. *Bosanquet*, Serjt., held that this taking was an act done in the execution of a penal authority, not the exercise of a civil right, and declared that he should direct the jury, that unless there was an especial direction given by the lord of the manor to act on this particular occasion, the issue ought to be found for the Plaintiff. No evidence was actually given even of a general command. Verdict for the Plaintiff, with 10s. 6d. damages.

Onslow, Serjt., had in *Easter* term, 1817, obtained a rule *nisi* to set aside this verdict and have a new trial, against which

Best, Serjt., now showed cause: he first urged, that at all events the Plaintiff was entitled to a verdict for taking the baskets, which the statute did not authorize game-keepers to seize. [As to which, the *Court* afterwards clearly laid it down, that by taking traverse on the command, the Plaintiff admitted the fact alleged in the third plea, that the Defendant necessarily took the baskets in order to examine them for the hares, and restored them as soon as possible. And there being a justification as to that, the Plaintiff could not recover a verdict for the taking the baskets, under the issue not guilty; and that the only question on the record for the jury to try, was whether the Defendant acted as the servant, and by the command of Dr. *Beauvoir*.] In the next place, the Plaintiff's counsel contended, that the lord of the manor was not authorized to give any such command. The statute (*a*) is, "that it shall be lawful for any justices of the peace, and the lords and ladies of manors within the said manors, to take away any such hare or other game, from any higler, chapman, inn-keeper, victualler, or carrier, or other person or persons not qualified by the laws to keep the same to their own proper use, without being accountable to any person or persons for the same." The authority to do this is not given to any gamekeeper, or other person, but only to the lords and ladies of manors; and the legislature never intended that the lord should delegate this power to his gamekeeper, for the same section proceeds to give to gamekeepers a very large power, although stopping far short of this power which is given to the lords and ladies; and if they could delegate that to persons in the condition of gamekeepers, it would render the exer-

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(a) 5 Ann. c. 14. s. 4.

cise of this law intolerable. The statute, which has two objects, the one to authorize magistrates in their counties, and lords and ladies of manors within their manors [where their authority is equivalent to the authority of a justice in his county], to seize game, and the other to authorize them to depute gamekeepers to kill game for their use, whose powers it next proceeds to define, and by that definition it disaffirms the lord's power to delegate to the gamekeepers any further authority. The statute of *Car. 2.* (a) enables gamekeepers to seize engines for the destruction of game, but not to seize the game itself. But if the law gave such power to the lords of manors, it has not in this instance been exercised. No warrant in writing was given for this purpose, not even any parol direction: no evidence of any such parol specific direction was tendered.

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Onslow and *Pell*, Scrjts., in support of the rule, contended that a general direction to the Defendant, as the servant, and by the command of *Dr. Beauvoir*, to take all hares, sufficiently authorized the Defendant to take these hares, under the statute of 4 *Ann.* c. 5.; and they had tendered proof that the Defendant was gamekeeper, and that he had received general directions to take all game: they did not rely upon the statute *Car. 2.* *Dr. Beauvoir*, as the lord, had a right himself to seize the hares, consequently he could add to his deputation a general direction to seize all hares; for if a specific direction were requisite, it would necessarily demand the personal presence of the lord. Whereas the statute, in giving the like power to the ladies of manors, necessarily contemplates a delegation of the power; for it cannot be intended that ladies should personally exercise a superintendence over the taking of poachers. And neither lords nor ladies can exert that nightly vigilance in the woods which is necessary for the detection of the poachers. Moreover, the form of the issue merely is, whether what the Defendant did was done by him as the servant of *Beauvoir*, and by his command: if his command was insufficient, that was a matter to be tried on the record in a different form. The evidence tendered of general directions to the Defendant ought to have been submitted to a jury, in order to try, whether what he did was done by the command of the lord or not. Whether the authority was sufficient, whether it was necessary that it should be in writing, as the warrant to seize engines under the statute of *Car. 2.* is re-

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(a) 22 & 23 *Car. 2.* c. 25. s. 1.

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quired to be, were points to be raised in another shape; and, considering the nature of the act to be done, and the species of property to be protected, the statute of *Anne* ought to be expounded liberally.

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GIBBS, C. J. This is an action of trespass for the seizing of three hares, and the baskets in which they were contained. The Defendant pleads the general issue, which is out of the case, because the seizure is proved. He then justifies on the statute 5 *Ann. c. 14. s. 4.*, and says, he seized the hares by command, and as the servant of Dr. *Beauvoir*, the lord of the manor in which the seizure took place; and as to the baskets, that he merely did that which was necessary in order to seize the hares, ripped them open, and took out the hares, and restored the baskets. The only question is, whether he did this as the servant and by the command of Dr. *Beauvoir*? It lay on the Defendant to prove this. The Plaintiff proved what was necessary for his case. The Defendant, to prove his justification, must prove such a command from Dr. *Beauvoir* as on the true construction of this act would be a justification. The Defendant admits he could prove no specific directions from Dr. *Beauvoir* to do this act. He could prove a deputation as gamekeeper, and he could prove some general directions on the subject. What those general directions were, we do not know; but we do know, that he could prove no directions to do the specific act for which the action is brought. The statute is, that justices of the peace in their counties, and lords and ladies of manors, within their manors, may take away such hares. *They* may do it, they may do it by themselves, or by others, but they must exercise their judgement on the question, in what case it is to be done, and when they have exercised their judgement on the case, and are satisfied that the game is in the hands of an unqualified person, they may use the hands of others to take it; but we are of opinion that they cannot delegate to others the jurisdiction given them by this act, of judging whether the person in possession of the game is, or is not, a qualified person. Let us then see, whether the statute *Car. 2.*, which gives the deputation to gamekeepers, authorizes this; it gives certain powers to gamekeepers, but not this power. The statute of *Anne* does not give this power. What then is there to give it, since the deputation does not?

[567] There is not, in this case, even a general direction to seize game in the hands of all unqualified persons; though, if there were such a direction, I think it would not avail, for the reason before given

given, that the lord or lady cannot delegate the power of adjudging whether the person be qualified or not. I therefore hold, that there is no such command of Dr. *Beauvoir* as would justify this act, and the Defendant stands unjustified.

DALLAS, J. I cannot agree with the Defendant's counsel, that this is a power to be liberally construed; but it is not necessary for us here to go so far, as to hold that a lord or lady of a manor must himself or herself personally execute the power; but it suffices to say, it is at least necessary, that the act of the servant should be in each case equivalent to the actual direction of the lord or lady in that specific case; and as there was no such authority given in this case, I am of opinion the direction of the learned Judge was perfectly right, and that the rule must be discharged.

PARK, J., after a full examination of the powers given to gamekeepers, by the statute of *Car. 2*, expressed his opinion, that the Defendant not being able to prove that he was specifically directed by Dr. *Beauvoir* to seize the hares in question, the justification was not proved.

BURROUGH, J. The question is, whether this act was done by the command of Dr. *Beauvoir*? I am quite satisfied that such an authority might be given by Dr. *Beauvoir*; but it must have been such an authority on which an action could have been brought against Dr. *Beauvoir*, if he was wrong: was there, then, any such direction in this case, upon which any such action could have been framed? I see no evidence of any such. For these reasons, as well as for those given by my Brothers, I am quite satisfied that the verdict is right, and that the rule ought to be

Discharged.

WALKER and Another, Assignees of DUNN, a Bankrupt,
v. LAING.

June 10.

THIS was an action of trover brought by the Plaintiffs, who were the assignees of *Dunn*, a bankrupt, to recover the amount of two bills of exchange, draw by *Dunn*, the one for 81*l.* 12*s.* 5*d.* upon *J. Liney*, the other for 95*l.* upon *P. Richardson*. Upon the trial of the cause at *Guildhall*, at the sittings

rest, after an act of bankruptcy unknown to the creditor, but with the creditor's knowledge that he the trader must stop payment, sign bills on his debtors in favour of the creditor, on stamped paper produced by the creditor. Held that the assignees of the creditor could not bring trover for these bills.

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after *Easter* term, 1817, before *Gibbs*, C. J., the facts appeared to be, that the bankrupt was indebted to the Defendant, who had repeatedly applied to him for payment; the drawees were indebted to the bankrupt, and the latter had long promised the Defendant bills on them for the amount they owed him. The Defendant knowing the bankrupt to be distressed, and being informed by him that he must shortly stop payment, but not knowing that he had committed an act of bankruptcy (which he had done), pressed him again for payment of the debt due to himself, and, producing the proper stamped paper, with the body of the bills drawn thereon, threatened immediately to arrest him, unless he would sign them. *Dunn*, under the urgency of his threats of arrest, signed the bills, which the drawees immediately accepted. For the Defendant it was objected, that the Plaintiff could not recover, and *Sherwill v. Matthews* (a) was cited.

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Gibbs, C. J., thought the action was not maintainable, and nonsuited the Plaintiff.

Best, Serjt., on this day moved for a rule *nisi* to set aside the nonsuit and have a new trial. He distinguished this case from *Mathew v. Sherwell*, because there the cheque had been paid, and from *Willis v. Freeman* (b). In *Arden v. Watkins* (c), the Court particularly notice that the holder of the bill could maintain no action, having known, when he took the bill, that the person indorsing was in a state of insolvency. Inasmuch as the Defendant has never received the money due on the bills, the assignees can maintain only trover or detinue for them; if the bills, indeed, had been paid, an action for money had and received would lie. Therefore there must be a failure of justice, if this action is not maintainable.

GIBBS, C. J. I wish to leave this case entirely to my Brothers, to decide in such a manner as they think the law requires; but I will state my reasons for my decision at *nisi prius*, from which I see no reason now to differ, and which proceeded on grounds which the counsel for the Plaintiff has not to day touched on in his argument. It has been held as a consequence of the statute of *James* (d), that if a debtor of a bankrupt has entered into an undertaking to pay a debt for him it shall be good. For example, if a bankrupt draws on his banker, and the banker accepts the bill, he is bound to pay it, and the money is to be

(a) *Anie*, 11. 439. (b) 12 *East*, 656. (c) 3 *East*, 325. (d) 1 *Jac.* 1. c. 15. s. 14.

allowed him by the assignees. The Plaintiff's counsel urges, that if the assignees may not recover in this case, it will enable a *bankrupt to distribute his property as he will, without danger of its being reached by his assignees. But that is not so. If he gives these bills to persons who can enforce them, and ought to enforce them, the payment of the bills stands good; but if parties who ought not to have the benefit of the bills play them off into the hands of innocent indorsees, the assignees may, nevertheless, in all cases recover the money back from some one. But the question in this case is, whether the assignees can bring trover for these bills? If these bills had passed into the hands of an innocent indorsee, and he had received payment of them, he could not have retained that money in opposition to the better title of the assignees; but there is no colour to say that either the bankrupt, before his bankruptcy, or the assignees, after the bankruptcy, had any property in these bills, which were mere orders signed by the bankrupt upon his banker, to pay over the amount to the Defendant: they might have brought an action for money had and received against the Defendant, if it had been paid.

DALLAS, J. The sole point is, in whom was vested the property of these bills? The paper belonged to the Defendant. The stamp was in like manner the property of the Defendant. The property of them never was in the bankrupt, nor were they ever the property of his assignees. I confine myself to this form of action, which is trover, and in which the Plaintiff's never can recover for these bills.

PARK, J., concurred in opinion.

BURROUGH, J. No doubt the debts for which these bills were drawn, were the property of the assignees; but these bills never were the property of the bankrupt, nor, consequently, the property of his assignees, and therefore the nonsuit is right.

Rule refused.

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June 10.

TOUSSAINT v. HARTOP.

Where a verdict is found for the Plaintiff, subject to an award; and before award made the Defendant dies, a subsequent award of a verdict for the Defendant, and judgement thereon, cannot be supported.

So, if a juror be withdrawn, and the cause referred, an award made after the Defendant's death is clearly bad. By *Gibbs, C. J.*

In entering into a rule of reference at *nisi prius* with a verdict for the Plaintiff, it is prudent to provide by a special stipulation, that the reference shall not be defeated by the death of one of the parties before award made.

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THIS was an action of trespass brought against the Defendant, who was messenger to the commissioners of bankrupt, to try the validity of a commission which had issued against *Hogg*, the fixtures and stock in whose house the Plaintiff had taken in execution, and whereof the Defendant, under the authority of the commission, had subsequently taken possession. The cause was tried at *Guildhall*, at the sittings after *Trinity* term, on the 5th of *July*, 1816, before *Gibbs, C. J.*, when a verdict was found for the Plaintiff, with 130*l.* damages, subject to an award on the question whether there were any debt due to the petitioning creditor, competent to support the commission against *Hogg*, so that the arbitrator should award before 5th *November*, with power of enlargement. The costs of the cause were to abide the event of the award, and the costs of the reference were to be in the discretion of the arbitrator. The Defendant died on the 25th of *August*, and the arbitrator, after enlarging the time to the first day of *Hilary* term, made his award on the 9th of *December*, finding that at the date of the commission, there was a good petitioning creditor's debt sufficient to support the commission; and he awarded that a verdict should be entered for the Defendant, and that each party should bear his own costs of the award. The Defendant's attorney thereupon obtained the *postea*, recording that "on the day and year within mentioned, the jury* say that the Defendant is not guilty." And in *Hilary* term he entered up judgement for the Defendant.

Best, Serjt., in the same term, moved to set aside the award and the judgement entered thereon, upon the ground that the arbitrator's authority was terminated by the Defendant's death.

Lens, Serjt., now showed cause: he insisted that there being a verdict in form taken, if it were modified by the award made under due authority it was well; if not, it must stand as it was given at the trial. The verdict so found was sufficient to prevent the suit from abating on the Defendant's decease. It was held in *Lee v. Lingard (a)*, and *Borrowdale v. Kitchener (b)*, that the verdict, when qualified by the award, is substituted, as

(a) 1 *East*, 401.(b) 3 *Bos. & Pull.* 244.

the verdict pronounced by the jury, and is so far recorded as such, that the party may enter judgement thereon, without any special application to the Court. The case of *Potts v. Ward* (a), he admitted, arose on a verdict.

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Hullock, Serjt., *amicus curiæ*, mentioned a case of *Bower v. Taylor* (b), recently decided in the Court of King's Bench, wherein it had been held, that under such circumstances the award and judgement were not vitiated by the death of one of the parties.

Best, in support of his rule, urged, that here the thing sought was not merely to alter the sum and reduce the damages found, but to substitute an entirely different verdict. The reason for the authority of the case in this Court would prevail over the authority of *Bower v. Taylor*. It was only by the statute of 17 Car. 2. c. 8., that after verdict, in the case of a death, the party can proceed to judgement. Usually there is nothing to be done after verdict, except to enter judgement; but here the verdict settles nothing, and therefore the verdict and award could not stand, and the rule ought to be absolute.

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GIBBS, C. J. With these two cases operating on each other, it is fit we should pause before we decide. The question is on the meaning of the rule of reference; for if it does nothing more than refer the cause, the award is null. Suppose that the parties withdraw a juror, and refer the cause to the arbitration of *A. B.*, then the case has no reference to a verdict; and where the parties take a verdict subject to an award, possibly it may be contended that the award failing, every thing shall stand as if there were no verdict.

BURROUGH, J. Still, if the authority is at an end, the verdict stands for the damages in the declaration, and that is what neither of the parties ever intended.

Cur. adv. vult.

GIBBS, C. J., now delivered the judgement of the Court. This was a question, whether upon a verdict taken at *nisi prius*, subject to be reduced by the award of an arbitrator, the decease of the Defendant before award made, revoked the authority. We were pressed by the authority of a former case in the Court of King's Bench, in which it was said to have been held, that such is not the effect of the party's death. My Brothers have considered it, and are of opinion that the judgement of this Court in

(a) 1 *Marsh*, 366. (b) *Bower v. Taylor*, *Mich. T.* 57 *Geo.* 3. in *B. R.* post 574. n.

1817. the former case of *Potts v. Ward* is correct. This decision will be of the less consequence, because, in future practice, care will be taken that the rule of reference shall provide for this case; the rule, therefore, for setting aside the award must be Absolute.

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1816. May 24.

BOWER v. TAYLOR and Another,
Same v. TAYLOR.

ONE of these causes was replevin, the other *assumpsit*; in the first a verdict was taken for the Defendant, in the other a verdict for the Plaintiff, in 300*l.* subject, by an order of *nisi prius* made at the *York* summer assizes, 1815, to a reference, with power to the arbitrator to direct whether the verdicts should be entered for the Plaintiff or the Defendant, so that the award were made before the 4th day of *Michaelmas* term, or such other time whereto the arbitrator should enlarge it. After the evidence was partly heard, but before it was ended, or award made, on the 24th *October*, *Taylor* died. The Arbitrator, on 3d *November* and 21st *January* respectively, enlarged the time for making his award, ultimately to the beginning of *Easter* term; and, on the 5th *February*, the arbitrator made his award, directing 62*l.* 16*s.* rent to be paid by *Bower* to *Taylor*, beyond the Plaintiff's demand in *assumpsit*, and a verdict for *Taylor* in the replevin suit. The Plaintiff's attorney in *January* gave notice to the Defendant's attorney not to proceed in the reference, on the ground that the evidence of the parties was material, which could not now be had, and that there would be a defect of mutuality in the remedy by attachment, and that the Court would be moved to set aside the award. The Plaintiff entered up judgement in these actions as of *Hilary* term, with a suggestion of *Taylor's* death.

Topping, in *Easter* term, 1816, obtained a rule *nisi* to set aside this award, against which

Hullock showed cause. When either party dies between verdict and judgement, his death shall not be alleged for error, so as the judgement be entered within two years after the verdict (a). And by the statute of *W. 3. (b)*, if there be two or more Plaintiffs or Defendants, and one or more of them die, if the cause of action survive to the surviving Plaintiff, or against the surviving Defendant, the action shall not be thereby abated, but such death being suggested, such action shall proceed at the suit of the surviving Plaintiff or Plaintiffs against the surviving Defendant or Defendants. The circumstance of the right of the Plaintiffs to take out *execution without a previous application to the Court, shows decisively, that the award is to be treated as the verdict of the jury. If any thing more were necessary to be done by the Court, the question might be different. In *Higginson v. Nesbitt (c)*, and *Grimes v. Naish (d)*, the Court gave leave to enter up judgement in the first instance on a verdict reduced by an award. So it was held in *Lee v. Lingard (e)*, when a verdict is taken *pro forma* at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury, and the Plaintiff is

(a) 17 *Car. 2. c. 8.*

(c) 1 *Bos. & Pull. 97.*

(e) 1 *East, 401.*

(b) 8 & 9 *W. 3. c. 7.*

(d) *Ibid. 460.*

entitled to enter up judgement for the amount, without any application to the Court. Lord *Kenyon*, C. J., there says, "A verdict is taken *pro forma* subject to the award of the arbitrator; but after the arbitrator has ascertained the sum to be recovered, such finding is in the place of the verdict, and must be considered the same as if the jury had originally found so much to be due: and then all the same consequences ensue." And again, "The award was in the place of the verdict of the jury." So in *Borrowdale v. Kitchener* (a), Lord *Alvanley* thus expresses himself: "By consent of the parties an arbitrator is at *nisi prius* substituted in the place of the jury; and where an award is made, the verdict must of course be entered so as to

correspond with that award." And in *Bonner v. Charlton* (b), *Le Blant*, J., said, "The true meaning of the rule of reference is, that the parties consent that the arbitrator shall mould the verdict which has been taken; and that the verdict so moulded by him, shall be taken to be the verdict which the jury should have found." So, in *Prentice v. Reed* (c), *Mansfield*, C. J., says, "It is urged that this is the finding of the jury, but that is mere form. It is in substance an agreement between the parties. The jury have in fact no concern with the matter. The amount is fixed by the counsel in the cause."

Topping endeavoured to support his application, but

The Court discharged the rule.

BOWER
v.
TAYLOR
and Another.

(a) 3 Bos. & Pull. 244.

(b) 5 East, 139. 144.

(c) *Ante*, I. 151.

ROGERS v. STANTON.

ROGERS sued out a writ against *Stanton*, and declared thereon, but no issue ever was joined therein. There were *accounts subsisting between *Rogers* and *Baddely*, between *Stanton* and *Baddely*, and between *Rogers* and *Stanton*: neither *Rogers* nor *Stanton* sued *Baddely*, but *Baddely* became party to a judge's order, entitled in this cause of *Rogers v. Stanton*, for referring all matters in difference between the three parties. There were no bonds of arbitration. The arbitrator awarded, that *Baddely* should pay *Stanton* 220*l.* and 7*4l.* costs. Before any judgement was entered upon the award, *Stanton* died. *Butt*, the executor of *Stanton*, came to *Baddely* attended by the attorney in this cause, and applied for payment without success. *Butt* had not obtained probate,

nor did he exhibit the Defendant's will to *Baddely*. *Onslow*, Serjt., in *Trinity* term, 1816, on behalf of *Butt* the executor of *Stanton*, without any process to revive the cause, moved in this cause for a rule that service of the award at *Baddely's* dwelling house, should be good service in order to ground thereon an attachment, upon an affidavit of belief that *Baddely* kept out of the way to avoid a personal demand of payment; and that rule being made absolute, he, on a subsequent day, obtained a rule *nisi* for an attachment against *Baddely* for a contempt of the rule of this Court whereby the cause stood referred, incurred by his not having paid the money in pursuance of the award.

Copley, Serjt., now showed cause. He first insisted that, by the death of

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1816. June 14.

But if a stranger to the cause become by rule of Court party to a reference made in the cause before any jury is sworn, and if, after the award made, but before judgement, one of the parties to the cause die, though the cause abate, the rule of Court is not defunct as to the stranger; but an attachment shall go thereon, for non-performance of the award.

An executor may have, without *scire facias*, or other

process of revivor, an attachment for non-performance of an award made in his testator's cause in his lifetime in favour of the testator.

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v.
STANTON.

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Stanton the action was abated; the action being abated, every executory rule of the Court, for a thing to be done in future in the cause, was gone with it; they purported to be, and in effect were, orders for regulating the course of that suit; they had no other power; and when that suit no longer existed, it could be no longer regulated. All proceedings in that cause then dropped to the ground. The Court owed its whole jurisdiction in this matter to the existence of this cause; for an order of the Court made upon individuals, who were not suitors, would be wholly inoperative; the breach of an agreement made in this court, but not made in a cause, would not be a contempt of the Court. Nothing was better settled than the maxim, that consent cannot give jurisdiction. Secondly, he urged that *Baddely*, even if he were so far bound by the award that an action could be maintained thereon against him, which he admitted would be the effect of the submission, considered as a contract between the parties, yet he was guilty of no contempt. It did not lie within the knowledge of *Baddely* that *Butt* was the Defendant's executor; he had obtained no probate. The person who had been attorney for *Stanton*, and who joined in the application for payment, had ceased to be attorney in the cause; for when the cause abated, his warrant was at an end; and he therefore was not authorized to demand the money. The Court in this instance derived no jurisdiction from the statute of 9 & 10 *W. 3. c. 15.*; for this was not a submission pursuant to that statute. Moreover, there was

neither verdict nor interlocutory judgement in this case, consequently the Defendant was not aided either by the statute of 17 *Car. 2. c. 8.* or by the statute of *8 & 9 *W. 3. c. 11. s. 6.* *Butt* could not substitute the arbitrator's award either for a verdict, or for an interlocutory judgement, so as to bring the case within either of those statutes. Further, if *Butt* could in any manner avail himself of the former proceedings in this cause, at least he must, before he could come into this Court as a party to the suit, proceed by *scire facias*, which he had not done. Even if a judgement had been entered on the award before the Defendant's death, his executor must have revived it by *scire facias*, before he could reap the fruit of that judgement. *A fortiori*, where the suit had abated before judgement, some process to revive it was necessary.

Onslow, in support of his rule, urged, that the award being made before the death of the party, upon his decease all his rights vested in the executor. If the executor had not sufficiently shown his authority, yet the attorney in the cause was authorized by his warrant to demand payment. Further, it was sworn that when the executor applied for payment, *Baddely* promised to pay him.

GIBBS, C. J. I do not see any reason why the executor should not have this remedy. The award is, that Mr. *Baddely* shall pay to the Defendant, his executors or administrators, the awarded sum. He has undertaken that he will perform the award.

Rule absolute. .

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HARMAR and Another, Assignees of EDWARD DAVIS v. GILBERT DAVIS. June 13.

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THIS was an action brought by the assignees of *Edward Davis*, a bankrupt, against his brother the Defendant, for goods sold and delivered, and money lent, and on the other usual money counts. The Plaintiffs delivered a bill of particulars, in which they confined themselves to the sum of 624*l.* 15*s.*, being one moiety of the money which the Defendant had received * for the bankrupt's use, from the keeper of a lottery office, as the proceeds of one eighth part of a lottery ticket, which had been purchased jointly by the bankrupt and a person named *Ridler*; and annexed to the particular a declaration that "the Plaintiffs did not know or believe that the bankrupt was indebted to the Defendant in any sum of money whatever, or that he had any counter-demand against the bankrupt, or against the Plaintiffs as his assignees, and therefore they could not give any creditor account." The Defendant gave notice of disputing the commission of bankrupt, which had been obtained on his own petition, supported by an affidavit that the bankrupt was indebted to him in 303*l.* 2*s.* 2*d.* Upon the trial of the cause at the *Gloucester* spring assizes, 1817, before *Park, J.*, the Plaintiffs proved a payment of 224*l.* 15*s.* to have been made by the bankrupt to the Defendant, in contemplation of bankruptcy. The Defendant proved that the sum which he had received for the lottery ticket, he had instantly paid over to his brother; so that that demand did not subsist, and inasmuch as the sum established by the Plaintiffs to be due from himself to them, would, if set off, and deducted from the debt of 303*l.* 2*s.* 2*d.*, on which the commission issued, reduce the debt due from the bankrupt to himself, to 78*l.* 7*s.* 2*d.* a sum insufficient to support the commission, the Defendant contended that the Plaintiffs had destroyed their own case, and had shown that the commission was invalid, and that they had no title on which they could recover: the Defendant also contended, that the declaration of the Plaintiffs, annexed to their particular, that no debt or counter demand was due from the bankrupt to the Defendant, was a denial of the petitioning creditor's debt, and a repudiation of the commission; but this point *Blosset, Serjt.*, on the discussion before the Court above,

If the assignees of a bankrupt suing the petitioning creditor for money of the bankrupt's which he has got into his hands, accidentally show that, on a statement of accounts between the Defendant and the bankrupt, the balance due from the latter is less than sufficient to sustain the commission, the Defendant nevertheless is estopped from taking advantage of that fact to defeat the action, by his affidavit of debt, made to support the commission.

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HARMER
and Another
v.
DAVIS.

abandoned. The Plaintiffs, on the other hand, contended, that the Defendant was estopped by his own affidavit of debt, from now denying the amount thereof to be 303*l.* 2*s.* 2*d.* The jury found a verdict for the Plaintiffs for 224*l.* 9*s.* 6*d.* subject to the opinion of the Court.

Blosset, in *Easter* term had obtained a rule *nisi* to set aside this verdict and enter a nonsuit.

Lens, Serjt., in this term showed cause, urging that it did not lie in the mouth of the petitioning creditor to contest the amount of the very debt on which he himself had petitioned; it was, with relation to him, a good petitioning creditor's debt by estoppel, and he could not impugn that, which, under the direction of the bankrupt acts, he had sworn to, however the commission might be void as to others. He could not make any use of that fact in this action, nor defeat the claim of the assignees by withdrawing himself from the character of petitioning creditor.

Blosset, in support of his rule, urged, that when the Plaintiffs by their action cut down the debts due to the Defendant as petitioning creditor, the commission cannot be then supported. The Plaintiffs destroy their own right to recover. If a party who sets up an estoppel, afterwards gives evidence which is contrary to the estoppel, the jury are not bound to find according to the estoppel. The fair meaning of the affidavits is, that when the accounts are balanced, the bankrupt is indebted to the Defendant in a balance of 100*l.* and upwards. If so, this sum of 224*l.* 9*s.* 6*d.* must necessarily have been taken into that account: it is no where stated in the depositions, that this sum was not considered in the account between the parties. The jury under this act of *Geo.* 2. ought to ascertain the balance, and then they cannot find more than 79*l.* to have been due to the Defendant, and therefore the Plaintiffs strike away the commission from under themselves.

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The Court were of opinion that the amount of the petitioning creditor's debt could not be disputed in an action brought against the petitioning creditor, by the assignees deriving title under the commission which the Defendant himself had sued out. It was not competent to the petitioning creditor to controvert this affidavit of debt, which he had made under the directions of the statute.

Rule discharged.

This event of the cause precluded a question that had been raised respecting the costs of contesting the bankruptcy.

POWELL

1817.

POWELL v. GRAHAM, Executor of GRAHAM.

June 24.

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THE Plaintiff declared in her first count on an *indebitatus assumpsit* for wages or salary due to her from the testator, for her service as his servant; and averred a promise by the testator to pay, but showed no breach. The four next counts were the usual money counts, alleging that the testator was indebted, and that the testator promised to pay, and showed a breach in the nonpayment either by the testator in his lifetime, or by the Defendant, *executor as aforesaid*, since his decease, not averring assets. The Plaintiff further declared, that in the testator's lifetime, in consideration that the Plaintiff, at the testator's request, would enter (as she stated it in the sixth count), and (as she averred in the seventh count) had entered, into his service, as a nurse and housekeeper, and would continue to serve him as such, until his death, at certain wages, to wit 20*l.* per annum; the testator undertook, that his executors should after his decease pay, as such his executors, to the Plaintiff a certain sum, to wit, 20*l.*, and she averred her service and continuance therein to his death, and notice after his death to the Defendant as executor, and that by reason of the premises, the Defendant became liable as executor to pay the Plaintiff that sum, and in consideration thereof promised to pay whenever he the Defendant, executor as aforesaid, should be requested. In the eighth count, the Plaintiff averred that in the testator's life-time, in consideration that she was in his service, and would be therein at the time of his decease, the testator promised her, that his executor should in a reasonable time after the testator's decease, pay, as such his executor, a certain sum besides her wages, and she averred that she was in the testator's service at his death, and notice after his death to the Defendant, whereby, and by a reasonable time being elapsed, the Defendant became liable, as executor, to pay, not averring any promise of the executor made in consideration of that liability. In the ninth count, she stated that the Defendant, as executor as aforesaid, after the testator's death accounted with the Plaintiff of monies from the Defendant as executor to the Plaintiff due, and was found indebted, and the Defendant as executor, in consideration thereof, promised to pay the last-mentioned money, and avers that the Defendant, *executor as aforesaid*, hath not paid, although the Defendant as executor, was requested

A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action in *assumpsit* against the executor.

And in such action, it is neither necessary to aver assets.

Nor a promise by the executor; by three, *Burrough, J., dissentiente.*

On a count averring an account stated by the Defendant of monies due from him as executor, the judgement shall be *de bonis testatoris.*

It may be therefore joined with counts on promises of the testator.

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quested. The Defendant demurred, and assigned for causes, that the several counts and the causes of action therein mentioned were misjoined, inasmuch as the last count stated a contract and cause of action not arising till after the testator's death, although the several other counts were on contracts with the testator. The Plaintiff joined in demurrer.

This case was twice spoken to in *Easter* term, by *Vaughan*, Serjt., in support of the demurrer, who on both occasions was requested to postpone the conclusion of his argument that the Defendant's counsel might more fully consider how the 7th, 8th, 9th, and 10th counts were affected by the doctrine held in *Rann v. Hughes* (a).

[583] *Vaughan*, in support of the demurrer, contended; first, that the joinder of the 8th count with the preceding counts was a misjoinder of action, because, as he assumed, upon the 8th count the executor would be chargeable *de bonis propriis* and not *de bonis testatoris*. For this proposition he cited *Rose v. Bowler* (b), which he supposed to overrule *Secar v. Atkinson* (c), and he distinguished this case from *Powley v. Newton* (d) by the difference which exists between a Plaintiff executor and a Defendant executor, the effect of which distinction was recognized by the Court in the case of *Ord v. Fenwick* (e); *Elwes v. Mocattoe* (f), which was cited in *Secar v. Atkinson*, was in like manner the case of a Plaintiff executor. *Ellis v. Bowen* (g) would be cited by the Plaintiff, but it was precisely similar to *Secar v. Atkinson*. Secondly, the 8th count, considered by itself, was defective. *Brigden v. Parkes* (h) also shows that there is a misjoinder here. It was necessary here, at least, to aver that the Defendant had assets, and that the Defendant, in consideration of having assets, promised to pay, as was done in *Lee v. Muggridge* (i), without which averments, that action could not have been supported (k). In the actions for legacies which the Courts for some time entertained, there was uniformly an averment of assets, as in *Hawkes v. Saunders* (l), and in *Atkins v. Hill* (m). In *Rann v. Hughes* there is an averment that the Defendant, being liable, promised. In *Deeks v. Strutt*, the last case decided upon the question of suing for legacies in the common law Courts, there was an averment of assets, and of the Defendant's consequent liability, and

(a) 7. *Term Rep.* 550. n. 7 *Bro. Parl. Cas.* 550.

(b) 1 *H. Bl.* 108. (f) *Cit. in* 1 *H. Bl.* 102. and in *Jenkins v. Flume*, 1 *Salk.* 208.

(c) 1 *H. Bl.* 102. (g) *Forrest*, 98 or 198. (k) 1 *Salk.* 208.

(d) *Ante*, VI. 453. (h) 2 *Bos. & Pull.* 424. (l) *Cowp.* 289.

(e) 4 *East*, 104. (i) *Ante*, V. 36. (m) *Cowp.* 284.

a promise to pay. At least it must be necessary to aver either the possession of assets, or an express promise of the testator if not both. He referred to the authorities collected in the first part of a note in *Coryton v. Lithebye* (a), not adverting to the correction, which subsequent decisions had impelled the learned editor to subjoin in the latter part of the same note.

Best, Serjt., *contra*, contended that there was no misjoinder, because the Defendant, upon his account stated of monies due from him as executor, was liable *de bonis testatoris*, and not *de bonis propriis*: for this proposition *Ellis v. Bowen*, and *Secar v. Atkinson*, were directly in point. And he cited *Judin v. Samuel* (b), and *Powdick v. Lyon* (c), as establishing, that if either count in the declaration were good, there being no misjoinder, the Plaintiff was entitled to judgement on that count. The cases of actions for legacies were long since exploded, but while they were recognized, there was a reason for an averment of assets in these cases, which does not exist here, namely, that until all the debts are paid, the executor is not warranted in paying legacies; and the averment there, consequently, was not an averment of assets generally, but of assets beyond what sufficed to pay all the debts. The same distinction made an express promise in those cases necessary. But it has never been necessary for a creditor of the deceased to aver assets; for the Plaintiff cannot know whether the executor has assets or not, the want of assets is to be set up by the executor as matter of defence. The 8th count is good, for it shows a good cause of action; viz. a good consideration moving to the testator, and a promise made by him thereon, and an averment that the executor, in consideration thereof, became liable: *Lee v. Muggeridge* is irrelevant. *Brigden v. Parkes* was decided upon the ground that the Defendant is not stated to have accounted "*as executor*," though he is styled by the addition "*executor as aforesaid*." *Rann v. Hughes* is not applicable to this case.

GIBBS, C. J. We are all of opinion that there is no misjoinder; but on the first point my brother *Burrough* differs from the rest of the Court. This action is brought by the Plaintiff against the representative of the deceased, upon a promise by the deceased that his representative shall pay so much money to the Plaintiff: if the representative does not pay that money, it is no breach of any promise of the representative: but it is a breach

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(a) 2 *Wms. Saund.* 117. *c.* written before the decision in *Ord v. Fenwick*, and others of that class. (b) 1 *New Rep.* 43. (c) 11 *East*, 565.

1817. of the promise of the deceased. If the deceased has left assets, the representative is bound to apply them in satisfaction of the testator's engagements. If the representative will not pay, what is the remedy? How can the person to whom the promise is made, possibly recover the money, but by bringing an action against the executor, and therein treating this as a debt completely due to her on the promise of the testator, and stating that the executor is bound to pay her out of the assets? What is the consequence? If the Defendant has no assets, he may plead it, and the Plaintiff can have judgement *de bonis quando*. If she cannot have this action, she is completely without remedy, unless the executor chooses voluntarily to pay her. If the Defendant has no assets, I am of opinion that that fact ought to come, as matter of defence, from him, and therefore that the Plaintiff may recover on the 8th count. Supposing that count to be bad, the Plaintiff is entitled to judgement on all the other counts, for is there any misjoinder? In all of them the Defendant is charged either on the promise of the testator, or on a promise made by the Defendant as executor. A count on a promise made by the Defendant as executor has no force further to charge the Defendant, than a count on a promise of the testator. In several cases the Defendant has been charged as promising as executor, and yet he has been held liable *de bonis propriis*; but that is, because, in those cases, the nature of the debt has been such as necessarily made the Defendant liable *de bonis Propriis*. For example, where there has been a count against him for money had and received by him as executor, if he receives the money [586] he must be personally liable. So, of money lent. So, of money due on an account stated. But this proposition must be confined to the case of an account stated of money received by himself personally. If this distinction be attended to, it preserves all the cases from the charge of inconsistency. Every case, though apparently discrepant, may be reconciled in this mode; and therefore I am of opinion that there is no misjoinder here, and that neither of the counts, separately, is liable to the demurrer.

PARK, J. The rule has been well laid down by my Lord Chief Justice, and the question is, whether the same plea can be pleaded to all these counts, and the same judgement given on all. If money were lent to an executor himself, even though it were to be employed for purposes of the testator, yet the loan is made to the executor himself; and thus are reconciled the judgements given in this Court by a very learned person in two cases of
Secar

Setar v. Atkinson, and *Rose v. Bowler*. The justice of the case is with the Plaintiff, and I concur in the judgement given by my Lord Chief Justice.

BURROUGH, J. A promise made by a testator that his executor shall pay, is not, *prima facie*, binding on the executor: in order to make it binding on him at all, it is necessary to go further, and to show that he has the means of paying. This was so held in a case of *Williamson v. Losh*, in 1774, 'in the Court of King's Bench; and the case of *Perrot v. Austin* (a) was there cited, wherein the Court say, "if one covenant that his executors shall pay 10*l.*, debt lies not against his executor." *Williamson v. Losh* was an action on a note in writing given by the testator, promising that his executor should pay his niece 100*l.*; and the impression made on the bar was, that but for the express averment of assets, the executor would not have been liable. I have above said, that no action lay against the executor, on the promise of the testator; and how should it? for it is only in consequence of the assets coming to hand, that the executor is liable to disburse. This was so thought by the pleader who drew the declaration in *Lee v. Muggeridge*: he has made an averment of assets, framed according to the declaration in *Williamson v. Losh*. It is said that the Plaintiff is aided by the averment, that the Defendant, as executor, became liable to pay: that is an averment of a mere consequence of law, and does not assist him. If this cause were tried, it would be incumbent on the Plaintiff to show that the Defendant had assets, or he could not recover; for here the debt was not complete in the testator's time: in the other cases the debt is complete before the action is brought, I therefore differ from the rest of the Court in thinking this count is bad, but the judgement upon the other counts must be for the Plaintiff (b).

(a) *Cro. El.* 232. (b) *Dallas, J.*, was absent this day in consequence of indisposition.

DONNE v. MARSH.

June 16.

PROCESS was served on the Defendant, returnable on the morrow of the *Ascension*, in *Easter* term, being the 16th of May. Where a Defendant has obtained time to plead, and failed to plead within the time given, no subsequent rule to plead is necessary, previous to the Plaintiff's signing judgement for want of a plea. And that, although the time to plead expires in the preceding term, and the Plaintiff do not sign judgement till the subsequent term.

May.

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May. On the same or the next day, a declaration was filed ~~de~~ *bene esse*, and a rule to plead *was given in that term. On the 29th of *May*, the Plaintiff consented to an order for time to plead till *Saturday*, 31st *May*, at 12. An appearance was filed by the Plaintiff on the 2d of *June*, being the essoign day of *Trinity* term, and on the same day the Plaintiff signed interlocutory judgement for want of a plea, without giving any rule to plead as of *Trinity* term. *Pell*, Serjt., on a former day in this term, had moved to set aside this judgement with costs, for irregularity, which he contended consisted in the want of a rule to plead, for which position he relied on *Taylor v. Slocomb* (a), and *Impey's Practice* (b), and he endeavoured to distinguish this case from *Towers v. Powell* (c), because there a rule to plead had at one period been given.

Best, Serjt., showed cause *instantèr*: he cited *Starkie v. Wilkes* (c), cited and recognized in *Towers v. Powell*, as deciding, that where the Defendant has obtained time to plead, it is unnecessary to serve him before signing judgement with a rule to plead; and *Decker v. Shedden* (d), wherein the Court recognized this practice, though they held that it did not extend to the case where a mere summons for time to plead was taken out, without any order being made thereon.

Cur. adv. vult.

The Court on this day recognised the propriety of the decision in *Towers v. Powell*, and held that no rule to plead was necessary under the circumstances; but they relieved the Defendant on an affidavit of merits, and payment of costs.

(a) *Barnes*, 243.

(c) 1 *H. Bl.* 87. & 1 *Crompt pr.* 166.

(b) *Imp. Pr. title, Rule to plead*, p. 218 & 278. (d) 3 *Bos. & Pull.* 180.

June 17.

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*STAPLETON v. MACBAR (a).

The Court will not relieve the bail of a bankrupt who are fixed between the signature of the bankrupt's certificate by his creditors

and the commissioners, and the time of the allowance of the certificate by the Lord Chancellor.

Seem, that a bankrupt's certificate has no relation back to any earlier period than the Lord Chancellor's allowance thereof.

THE Plaintiff had obtained a judgement for 52*l.* 10*s.* in an action on a bill of exchange, which was affirmed in error, whereon a writ of *capias ad satisfaciendum* issued, returnable in eight days of *St. Hilary*, and it was returned *non est inventus*. The Plaintiff afterwards sued out a *scire facias*, and an *alias*

(a) *Dallas, J.*, was absent this day in consequence of indisposition.

scire

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scire facias, returnable on the Morrow of the Ascension, the 16th of May. A commission of bankrupt had issued against the Defendant on the 13th of January, and his certificate was signed by his creditors and the commissioners on the 31st of March, and was allowed by the Lord Chancellor on the 3d of June: the rule on the *scire facias* expired on the 20th of May. *Best*, Serjt., had obtained a rule *nisi* to enter an *exoneretur* on the bail-piece, upon the ground that the bail were discharged by the bankruptcy and certificate. Against which

Vaughan, Serjt., now showed cause, contending that the certificate must take effect, not from the date of the allowance by the creditors and commissioners, but from the date of the allowance by the Lord Chancellor, until which last, it was, to many intents, an imperfect instrument.

Best, in support of his rule. It is not the certificate that discharges the bankrupt from his liability, but the conformity to the bankrupt laws, of which the certificate is only evidence, and when the bankrupt has obtained that evidence, he may come to the Court and take advantage of his conformity. The creditors and commissioners signed the certificate before the *scire facias* was returnable. But even if this were not so, the certificate relates back, when signed. In *Bromley v. Goodbehere* (a) Lord Hardwicke, Chancellor, says, "The operative force of the certificate arises from the consent of the creditors: the reason of the allowance by the Chancellor, is to prevent surprise, and is but a condition subsequent, if you make it a condition; and when the certificate is confirmed, it has its effect from the beginning." *Lawrence, J.*, expresses the same opinion in *Harris v. James* (b). He says, "it is the conforming to the statutes which gives the discharge, of which the certificate is only the evidence." The question therefore is, whether the Court are to look to the certificate at the moment of its allowance, or at the period to which it relates. He referred to the language of the act. The authority of Lord Hardwicke is more than equal to the authority of the loose case of *Walker v. Gibbett* (c).

GIBBS, C. J. This is not a question upon any property of the bankrupt's, but on the propriety of granting relief from a proceeding against the bail: it is neither a question respecting the person of the bankrupt, nor respecting the effects of the bankrupt, but a question whether the bail, who by the letter of

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(a) 1 Atk. 77.

(b) 9 East, 86.

(c) 2 Wm. Bl. 811.

their

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their contract are liable, shall be discharged. In the case of *Walker v. Gibbett*, the action was brought in 1765, the certificate signed in 1766, the debt proved in 1767, the certificate allowed early in 1768, and the judgement on *the *scire facias* against the bail was dated the 4th of June, 1768. The bail brought error, and the Court held that the allowance of the certificate has no relation back; and that until it was allowed by the Chancellor, it was nothing. It is matter of indulgence whether the bail shall be relieved or not; and the only ground on which the Court relieve the bail, is, that at the time when you proceed against the bail, the principal is discharged; but here, at the time that the Plaintiff obtained judgement against the bail, nothing hindered the Plaintiff from pursuing the principal. If what my Brother *Best* has last stated were confirmed on an accurate investigation of the case, that we were running in opposition to a determination of Lord *Hardwicke*, I should much hesitate, before I came to this decision, but Lord *Hardwicke* was looking at another operation of the law. The question here is, of relieving the bail. The rule is, that bail, fixed by a regular judgement, shall not be relieved, unless the bankrupt was, at the time when they were fixed, in such a situation that he could not be sued. Their relief, up to the time when the *scire facias* is returnable, is matter of right: their relief for eight days afterwards is matter of indulgence; but there is no instance where relief has been given on the ground that before the bail were fixed, the bankrupt had conformed. As no such case has been found, I am clear the bail are not entitled to relief.

PARK, J. I am clearly of opinion on this point, and why the decision to which those eminent persons *Gold* and *Blackstone*, Js., came in 1773, should be called a loose decision, I cannot conceive, only because Lord *Hardwicke*, upon a different point of the bankrupt law, was of a different opinion.

[592] BURROUGH, J. I have looked into the law of this case, and am fully of opinion the bail are not entitled to relief. There is the bankrupt's oath to be taken, which is a very material part, and the Chancellor's allowance operates upon the whole. It is therefore a plain consequence from the statute 5 Geo. 3. c. 30., which requires that oath, that the bail are not entitled to this relief.

Rule discharged without costs.

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FARQUHAR v. FARLEY.

June 17.

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THIS was an action brought on the non-performance of a contract against the Defendant, who had exposed to sale by auction a reversionary interest in certain bank stock, which the Plaintiff had contracted to purchase, upon the terms (amongst others), that he should pay down a deposit of 20 per cent., and sign an agreement for payment of the remainder on having a good title. The Plaintiff had been declared the highest bidder, and had paid a deposit of 248*l.* into the hands of the auctioneers, Messrs. *Hoggart and Phillips*; whom after four years, the title not being satisfactorily deduced, he sued for principal and interest, and recovered the principal only. He now averred in his declaration against the Defendant, as a special damage, the payment of 24 *l.* deposit, and that by reason of a good title not having been made, he had lost the interest and benefit of the deposit for four years and thirty-two days, and had paid 10*l.* for investigating the title,* and 20*l.* for the costs of suing the auctioneers. The Defendant suffered judgement by default, and upon the execution of a writ of inquiry in *London*, the secondary held, first, that the Plaintiff could not recover interest on 248*l.* the extent of his deposit alleged being only 240*l.*; but, secondly, it being proved that the Plaintiff had declared for this same interest in his action against the auctioneers, the secondary held, that though he had not therein recovered it, yet as he had in that cause declared for it, he could not now recover it in this action, and the jury did not give the interest.

Where the purchaser at an auction of a reversionary interest in bank stock, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, held that he might nevertheless recover interest on the deposit in an action against the vendor for not completing his contract, under an averment of special damage in the Plaintiff's losing, by reason of the non-performance, the interest and benefit of his money.

Pell, Serjt., on a former day had obtained a rule *nisi* to set aside this inquisition, and execute a new writ of inquiry; against which

Blosset, Serjt., now showed cause. Although judgement by default admits the cause of action (*a*), yet all special damage laid, being mere matter of aggravation, must be expressly proved. The Plaintiff is not entitled to this interest as a special damage for this money being detained by the auctioneer, first, on principle, secondly, on two cases; first, the auctioneer is a mere stakeholder, he holds the deposit neither for the one party nor the other; but he holds it until it appears whether a good title

(a) *East India Company v. Glover*, 1 Str. 612. *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 368.

1817. be made out or not. The auctioneer has the use of the money. The vendor has no use of the money. *Burrough v. Skinner* (b), *Edwards v. Hodding* (c). If an action will not lie against the vendor for the principal, unless the auctioneer has paid it over to him, it cannot lie against him for the interest. The Plaintiff has made his election to sue the auctioneer for this very interest, and has thereby declared that he looked to the auctioneer as a depository for his use; after this he cannot sue the principal for it.

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Pell maintained his application on the ground that, in an action on a contract which was broken by the Defendant, it was open to the Plaintiff to show the different sorts of damage which he had sustained by reason of the non-performance of the contract. For the Defendant it had been argued, that if the Plaintiff were entitled to interest at all, he must be entitled to recover it against the auctioneer, because he had had the money. But the auctioneer with more reason had urged, that if the Plaintiff was entitled to interest at all, it must be to recover it from the principal.

GIBBS, C. J. This is an action against the vendor of an estate, who acted through an auctioneer; and the single question is, whether the Plaintiff, on this declaration, be entitled to recover what he has lost of interest on his deposit, in the shape of damages. It is certainly laid down in many modern cases, that if money be lent or money received, without a precise time stipulated for the repayment, interest cannot be recovered, unless there subsist a specific contract for it. Here the Plaintiff, knowing that the money was paid to the auctioneer, to be held merely as a stake, subject to be instantly paid over on performance of the contract at any time, could not recover interest against him, unless under particular circumstances. If, indeed, it had appeared that the auctioneer had actually made interest of the money, it might have been a question, whether that interest might not be recovered against the auctioneer. But here is a contract, that 20 per cent. shall be paid in part of the purchase money, as a deposit, and that the residue shall be paid on the purchaser having a good title. The Plaintiff sues, and alleges as a part of the damage, which he says he has sustained, that he has lost, from the time when the contract ought to have been completed, the use of the sum which he had deposited towards

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(b) 5 Burr. 2639.

(c) *Ante*, V. 815. and 1 *Marsh*, 377.

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his performance of the contract. There was a case tried before Lord *Ellenborough*, C. J., hardly distinguishable from the present. *De Bernales v. Wood* (a). That was an action in which the Plaintiff recovered back a deposit from the auctioneer himself; so it went even further than I should have thought it necessary to carry the law in the present case. In many cases it has been held, that on the mere fact of one man having in his hands the money which belongs to another, interest is recoverable. I am aware that that was a case against the auctioneer, and that on the principles laid down, an auctioneer generally is not liable for interest, but he may by his conduct render himself liable. *E. g.* if, when the title ought to be made out, the auctioneer was called on to pay over, and refused, he might be liable from that time. I only throw out this, that we may not appear to impugn a case in the Court of King's Bench, of which the circumstances do not appear. I therefore think that in the present case, the Plaintiff is entitled upon this declaration to recover.

PARK, J. The law has been laid down that on a mere loan of money, or a mere money transaction, interest is not a necessary consequence. This has been so held in many cases, and very recently in *Calton v. Bragg* (b), which was tried before Lord *Ellenborough* only two terms before this case, and that case was never afterwards moved in the court of King's Bench.

BURROUGH, J. This case leaves *Calton v. Bragg* (b) wholly untouched, and proceeds on the grounds mentioned in the first count, which, if I had read, I should not, even as counsel, have alluded to the case of *Calton v. Bragg* (c).

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Rule Absolute for a new writ of inquiry.

(a) 3 *Campb.* 258.
(b) 15 *East*, 223.

(c) *Dallas, J.*, was absent in consequence of indisposition.

MOOTHAM v. HOW.

June 19.

BEST, Serjt., moved to set aside an annuity of 72*l.* per ann. granted in 1806, on the ground that at the time of executing the deeds 350*l.* was put on a table, and that when the grantor was about to take it up, *Moore*, who was the attorney for her only, said that she must pay him 50*l.* for his expenses, and he deducted that amount from the sum then lying there, and paid her only the residue: he cited *ex parte Maxwell* (a) for an in-

Where the attorney for the grantor of an annuity at the time of the payment of the purchase money takes and keeps an unreasonable part thereof for the expenses of the

deed, this is not a ground on which the Court will set aside the annuity.

(a) 2 *East*, 85.

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stance of relief in a transaction as stale as this, and there too the parties were dead, here they were living.

Per Curiam. The question depends wholly on the retainer: if this person had been the attorney of the grantee, to be sure he must have accounted: but where he is the attorney for the grantor it is different. The Defendant must mix *Moore* in interest with the grantee: if it is agreed that the grantor is to pay the expenses, and she chooses to employ *Moore* as her attorney; the grantee must not suffer for that. Under these circumstances, I think the Court ought not to grant the rule. The time of the statute of limitations, too, is passed, and that gives them a *quietus*.

The rest of the Court concurred in

Refusing a Rule.

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June 20.

BLENKINSOP v. CLAYTON.

If a purchaser of goods draws the edge of a shilling over the hand of the vendor, and returns the money into his own pocket, which in the north of England is called the striking off a bargain, this is not a part payment within the statute of frauds.

Where a person who has contracted for the purchase of goods, offers to re-sell them as his own, whether this is proof of a delivery to himself, is a question for the jury.

IN this action, the Plaintiff declared for horses and goods sold and delivered, and for the keep of a horse sold to the Defendant. Upon the trial of the cause, at the York Spring Assizes, 1817, before *Wood, B.*, the Plaintiff proved that he had sent his servant with a horse to a fair to sell it, and that the Defendant, seeing the horse, followed it into a stable, offered 45*l.* for it, and said he should in half an hour have a stall in his stable vacant to receive it. The plaintiff's servant agreed to accept the sum named, and taking a shilling in his hand, drew the edge of it across the palm of the Defendant's hand, and replaced the shilling in his own pocket, which the witnesses called striking off the bargain. The Defendant afterwards brought a chapman to the stable, and stating to him that he had bought the horse, offered to sell it to him at a profit of 5*l.* which the other, discovering a supposed unsoundness, declined; in consequence of which discovery, the Defendant returned to the Plaintiff's stable, and declined his purchase. The Plaintiff contended, 1st, that the act of striking off the bargain, as above described, bound the contract so as to satisfy the statute of frauds; 2dly, that the Defendant's declaration that he had bought the horse, and his attempt to re-sell it, was evidence that the sale and delivery were complete, and entitled the Plaintiff to recover. *Wood, B.* reserved the points, subject whereto the jury found a verdict for the Plaintiff.

Hullock

Hullock, Serjt., in *Easter* term, had obtained a rule *nisi* to set aside this verdict and enter a nonsuit, against which

**Copley*, Serjt., now shewed cause. He contended, first, that the act called the striking off the bargain, which was a term well understood in the North of England, was such a part payment as complied with the statute of frauds. It was not invalidated by the money being instantly returned to the seller with the consent of the buyer. [But the whole Court denied that there was ever any payment or transfer of the shilling, even for a moment.] Next, if a purchaser treats the property as his own, that proves a sufficient delivery, as was held by Lord *Kenyon*, C. J., in the case of the sale of a stack of hay, *Chaplin v. Rogers* (a), wherein the Defendant had re-sold a part of it, though he afterwards refused to permit the second purchaser to take it. In *Elmore v. Stone* (b), there was no actual delivery. The Defendant cannot resort to the statute of frauds, after he has by his own act acknowledged the purchase. *Searle v. Reeves* (c).

Hullock, in support of his rule, denied that there was in this case any part payment, or any constructive delivery.

GIBBS, C. J., interposing, relieved him. The Court do not go all the way with the Defendant on all his points; but the Court is embarrassed by observing that it was not left to the jury to find whether there was any delivery or not; and on the first trial of the case of *Chaplin v. Rogers* the jury found there was an acceptance of the hay, and on the second trial they found that it had been delivered; and we are far from saying that we do not coincide with the learned baron who tried the cause in his direction, but we think it ought to be left to the jury, to find whether this was or was not a delivery; therefore there must be a new trial. This is very different from the case of the hay stack, for there nothing more could be done to confer a possession.

DALLAS, J. The only question here is, whether something else remained to be done; upon that point I have an opinion, but it is unnecessary here to disclose it, and I carefully abstain from stating what it is.

The Court, altering the form of the rule, made it absolute for a new trial.

(a) 1 *East*, 192.

(b) *Ante*, I. 458.

(c) 2 *Esp*, N. P. Cas. 598.

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June 19. EMMET and Another, v. JOHN BUTLER, THOMAS BUTLER, BEECROFT, NORRIS, and BRADLEY.

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Where three of five joint contractors had pleaded that after the promises and cause of action they became bankrupts, and the Plaintiffs proved their debt under the commission, and elected to take the benefit thereof, and issue joined on the proof under the commission, a question arising whether the other two Defendants had continued partners to the time of the contract, though the evidence on the issue on the bankrupt's plea is for them, they are not entitled to a verdict in the midst of the cause that they may be called as witnesses for the other Defendants.

Especially if the Defendants call witnesses.

THIS was an action for goods sold and delivered to the five Defendants, to which the Defendants *John Butler, Thomas Butler, and Beecroft*, pleaded, that after the stat. 49 G. 3. (a), to "alter and amend the law relating to bankrupts," and after the making of the alleged promises, and after the alleged causes of action had accrued, they became bankrupts, and a commission issued, under which they were duly declared bankrupts; that the plaintiffs proved under their commission, as a debt due from them the three Defendants, the same debt for which this action was brought, and thereby made their election to take the benefit of the commission. The Plaintiffs traversed their having proved under the *commission. *Norris and Bradley* pleaded the general issue. At the trial of this cause before *Wood, B.*, at the *York Lent* assizes, 1817, it appeared that the Plaintiffs had in *February, 1809*, received an order to erect certain engines for the *Calder Iron and Coal Company*, wherein the Defendants had been partners, and which order the Plaintiffs had executed, partly in *June, 1809*, and partly in *August and November, 1810*. The Defendants, *Norris and Bradley* contended that they were not liable, for that their partnership had been dissolved before the causes of action arose. To prove that all the Defendants jointly contracted, the Plaintiffs offered in evidence a deed of nine parts, dated 11th *August, 1810*, whereby it was recited that *Smyth* had purchased in fee certain veins of coal and iron ore, and had wrought them in partnership with the *Butlers and Beecroft*; and that *Bradley and Norris* had afterwards agreed to become partners with them, each in one-eighth; and that by deeds of 23d *November, 1805*, *Smyth* had conveyed in fee to a trustee for *Bradley and Norris*, two-eighths; that *T. Butler and Crashaw* had agreed to purchase the shares of *Smyth, Bradley, and Norris*; and the two *Butlers, Beecroft, and Crashaw* had agreed thenceforth to be partners in proportions specified, and to execute a partnership deed; and that the legal interest of the premises was in *Smyth, Bradley, and Norris*; and the parties had agreed that it should be conveyed to *Dickinson* as a trustee; and that inasmuch

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as no conveyance had been made to the *Butlers* and *Beecroft*, their shares also would pass by such conveyance. Then, in consideration of the premises, *Smyth*, *Bradley* and *Norris* conveyed, and the *Butlers*, *Beecroft*, and *Crashaw* confirmed to *Dickinson* the premises in fee, to the use of the several intended partners in the stipulated proportions: they also conveyed to him all their stock and personal effects in trust for the new partners in the like proportions. For the two Defendants, *Norris* and *Bradley*, a deed was put in evidence, dated 28th *April*, 1809, between *Bradley* and *Norris* of the one part, and *T. Butler* and *Crashaw* of the other part, whereby it was covenanted that *Bradley* and *Norris* should sufficiently convey to *T. Butler* and *Crashaw* all their interest in the iron works, and in the implements; and *Butler* and *Crashaw* agreed to pay 6000*l.* by instalments, and proper conveyances were to be prepared and tendered to *Bradley* and *Norris* for execution, and a proper mortgage was to be made to them for securing the purchase money, before *June* then next, and an engagement to indemnify *Bradley* and *Norris* against the debts of the *Calder* Iron Company. The Plaintiffs, however, proved that it was not till *September* or *October*, 1810, that *Bradley* and *Norris* ceased to take an active concern in the business of the colliery. It appeared that *Butler* and *Crashaw* carried on trade with *Beecroft* from 1809 to 1812, in perfect solvency, and the Plaintiffs never applied to *Norris* and *Bradley* for the debt till 28th *December*, 1815. The Defendants proved that the deed of 28th *April*, 1809, was communicated to the Plaintiffs and relied on their long acquiescence as a proof that they knew the partnership was dissolved. The proceedings under the commission of bankrupt were produced, under which the Plaintiffs proved a debt of 1200*l.* under the title of Messrs. *Smyth*, *Bradley* and *Norris*, debtors to *Emmet*, and the Plaintiffs admitted it was this debt. This the learned Baron thought proved the issue of the Defendants the *Butlers* and *Beecroft*, and this special plea must be found for those three Defendants. *Hullock*, Serjt., then prayed, on behalf of the Defendants *Norris* and *Bradley*, that a verdict for the defendants, *Butlers* and *Beecroft*, might be recorded, and that they might give evidence for the other Defendants to prove that the partnership was dissolved before the causes of action arose. and that themselves alone had contracted. Secondly, he urged that if not, still they were admissible witnesses, being disinterested in that cause as soon as it appeared that their plea under the statute was proved. *Wood*, B., thought that the ac-

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tion being on a contract, he could not permit a verdict for some, as it would discharge the whole. He had never known that course to be pursued in an action on a contract, but only in trespass; and he refused to sever the cause, or admit the witnesses, and directed the jury, that a part of the work, a pump engine, appeared by the evidence to have been ordered in *February*, 1809, before the supposed dissolution in *April*, 1809; and therefore *Bradley* and *Norris* would be so far liable, though they should have ceased to be partners before it was put up; he expressed his opinion that the agreement of 28th *April*, 1809, was not an actual dissolution, but an agreement for the future dissolution, and that as *Bradley* and *Norris* continued to act as partners till *June*, 1810, after the residue of the work, a blast-engine, was put up, he thought them liable for both engines. A verdict passed for the Plaintiffs against the Defendants, *Norris* and *Bradley*.

Hullock, Serjt., in *Easter* term, 1817, moved for a new trial, on the ground, first, that the three Defendants who pleaded their bankruptcy, ought to have had a verdict recorded in their favour, and been admitted as witnesses; secondly, that there had been a misdirection of the learned Baron in holding that the deed above stated was conclusive evidence that the partnership continued to exist at the date thereof [but the learned Baron's report disaffirmed this ground for the rule]. As to the first point, this plea goes not in discharge of the contract, but is a mere personal discharge of the party pleading it; as under the statute of *Anne*, if one of two pleads bankruptcy, the Plaintiff may enter a *nolle prosequi* under that statute; whereas in a matter at common law, a *nolle prosequi* against one of two joint contractors, would discharge the whole contract. *Moravia v. Hunter* (a). In *Noke v. Ingham* (b), and *Raven v. Dunning* (c), the only cases on the old acts of parliament relating to this subject, it was held, that the *nolle prosequi* as to one Defendant was not a discharge of the other. It was therefore quite competent for the Plaintiff on the present occasion to enter a *nolle prosequi* against three Defendants, and in that case he would have been clearly at liberty to call the first as witnesses. In a cause tried before *Le Blanc*, J., at *Lancaster*, *Chapman v. Graves* (d), the attempt was made to examine a Defendant as a witness for the Plaintiff: this is a case of examining the Defendant. As to

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(a) 2 *Maule & Selw.* 244. n. (c) 3 *Esp.* 35., and Appendix to *Peake on Evidence*, lxxxiv.
(b) 1 *Wils.* 89. (d) 2 *Campb.* 333. n.

the second point, he urged, that inasmuch as the deed contained no covenant defining the time when the partnership should begin, or in what shares, or for what debts the persons should respectively be liable; it was evidently a mere vehicle of the legal estate, and the partnership must necessarily be regulated by some other agreement or instrument.

The Court granted a rule *nisi*.

Best, Serjt., in this term showed cause. As to the first point, where any evidence at all has been aduced against a Defendant, he cannot be discharged (*a*). This rule is to be understood where there is no manner of evidence against the Defendant; for if there be, his guilt or innocence must await the event of the verdict. There is no determination of any judge, that where any evidence has been given, the Defendant may be discharged. *Raven v. Dunning and Chilton* (*b*), cannot be distinguished from this case. The Judge, therefore, did right in rejecting these witnesses, after the Defendant's counsel had opened his case, and had given much evidence by invoices for the purpose of identifying this debt. As to the other point, the witnesses of the Defendants themselves stated that they observed no difference in the conduct of these two partners up to *May*, 1810. *Wood, B.*, does not report that he ruled that this deed was conclusive evidence. The whole has been left to the jury. The contract for a dissolution on which the Defendant relies, is an executory contract. And no deed is executed between the agreement of *April*, 1809, and the deed of 11th *August*, 1810, up to which time all the partners acted as before. By the very recital of this deed, it appears that all were partners up to that very time, and intended then to dissolve and convey.

Hullock, in support of his rule, admitted that on the Judge's report he was put out of Court, but as to the point that the partnership deed had been held conclusive, he contended that there was no principle which prevented these witnesses being admissible. These three Defendants did not plead the general issue, but only the plea given by the statute 49 G. 3.: they admitted the identity of the debt and the regularity of the proceedings in the bankruptcy: there was no evidence against them to go to a jury. The Judge's first direction to the jury was, that there was no evidence against these three. The statute 49 G. 3. discharges the bankrupt from all costs: he was neither liable to contribu-

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(a) *Bull. N. P.* 285.(b) 2 *Esp. Peake's Evidence*, Appendix, lxxxiv.

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tion, nor to the costs. It has never been held that a witness is to be rejected, merely because he is a party upon the record. These witnesses, having no possible interest, are competent. In *Raven v. Dunning*, there certainly was the general issue, and the plea of bankruptcy under the old statute; but this plea arises from the act of the Plaintiff himself, who proves this debt under the commission: this is tantamount to the case of a *nolle prosequi*: if that be entered, can it be contended that the Defendant would not be a witness? In *Moravia v. Hunter*, there was an entry of *nolle prosequi* against the bankrupt. A motion was made in arrest of judgement, that the Plaintiff had by the *nolle prosequi* confessed the *non assumpsit*, but the Court held the contrary. So in *Noke v. Ingham*, after a *nolle prosequi*; and *Denison, J.*, says, the case is the very same as if it had been trespass against several Defendants. In some cases, where a Defendant is still liable on the record, he may be examined by the Defendant, as in trover, when one of two suffers judgement by default. And the reason why it is otherwise in *assumpsit*, is, because he would get rid of his liability to contribution, and so that is distinguishable from trover and trespass, *Ward v. Haydon (a)*. So held in trover by Lord *Kenyon* in *Dormer v. Fortescue (b)*. "If a material witness for the Defendant be also made a Defendant, the right way is for him to let judgement go by default." *Brown v. Brown and Jubb (c)* is the converse: one Defendant would, if his evidence prevailed, relieve himself from contribution. In *Chapman v. Graves (d)*, indeed, *Le Blanc, J.*, rejected the witness; but here, at the time when application was made to the Judge to enter a verdict for these Defendants, they were, in point of law and fact, entitled to a verdict on that plea, and were therefore then competent witnesses, and ought not to have been excluded.

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GIBBS, C. J. This case was moved on two grounds; first, that the Judge had rejected evidence which ought to have been received; secondly, that he had misdirected the jury, in stating the effect of a deed differently from what it really was. As to the first, these witnesses were offered to prove that the five Defendants had never entered into a joint contract with the Plaintiff; and these very witnesses by their plea admit that they did enter into that joint contract; for they plead, "We are absolved from that contract." They might have denied that con-

(a) 2 *Esp.* 552. (b) *Bull. N. P.* 98. (c) *Anta*, IV. 752. (d) 2 *Campb.* 332. n.

tract, and they certainly could not then have been witnesses, but they admit the joint contract. This is not a very promising commencement. But further, I know no law which requires a judge to stop in the middle of a cause, to consider separately the case of certain of the Defendants, that they may be made witnesses for the other Defendants. Under these circumstances, I think the learned Judge did perfectly right.

As to the next point, the Defendant's counsel applied on the ground that the Judge had held that the deed was conclusive evidence that the partnership continued up to the time of the deed; and that he gave in evidence the agreement of 28th *April*, 1809, to show that it was sooner dissolved. The Judge held, that agreement was not a dissolution in itself, but was a preparatory step, and looked forward to a dissolution; and taking all the facts together, the impression of the learned Baron was; that there was no proof of any dissolution previous to the 10th *August*, 1810; and he left it to the jury whether there was any previous dissolution, and he strongly thought there was none. I should have inclined, on the statement of the Defendant's counsel himself, to think, that the partnership continued down to *August*, 1810. The deed of 8th *April*, 1809, was merely a private deed between the partners themselves; and if it dissolved the partnership as between them, yet it would not affect strangers, as to orders previously given. Therefore I think on every ground, the jury were rightly directed.

DALLAS, J. The motion, so far as it is founded on the rejection of these witnesses, is an application of perfect novelty. That it is new, would not be conclusive, but on principle it cannot be supported. The principle is, that if no evidence is given against a Defendant, he may be acquitted and made a witness for the other Defendant; but if any evidence at all has been given, then the Judge and jury must exercise their judgement upon the proof: here, after a great deal of evidence, this application is made: there is no authority for splitting a case in this manner, and I think the witnesses are rightly rejected.

PARK, J. It is for the Defendant to find an exception to the general rule, and to show a case where, in an action on a contract, the Judge has been called on to make a separate judgement in the middle of the cause. In a case tried before *Le Blanc, J.*, at *Lancaster*, the case of a joint contract, one Defendant was allowed to be examined in an action on a joint contract, where a *nolle prosequi* had been actually entered, after a plea of bankruptcy.

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ruptcy. But in *Chapman v. Graves*, he rejected a Defendant who had suffered judgement by default, even in trespass, where his testimony went to inculcate the other Defendants.. I therefore, for one, do not feel warranted in establishing a new precedent here.

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BURROUGH, J. As to the partnership, there was much evidence that *Bradley* and *Norris* had actually intermeddled in the concern as partners at a later period than the work done; for there is evidence of their over and over again being seen on the spot. As to the other Defendants appearing as witnesses, I have never known a Defendant acquitted in trespass, unless where at the close of the Plaintiff's case the Defendant could ask for a verdict; but here evidence was given for the Defendant: further, here these persons have admitted on the record, that they were parties to the contract stated; and on this ground, if on no other, I am clearly of opinion, that these Defendants could not be called as witnesses.

Rule discharged.

June 20.

HELLINGS v. SHAW.

To a demand for the charges of preparing an annuity-deed, the Defendant said, "I thought I had paid it at the time, but I have been in so much trouble since, that I really do not recollect it." The Plaintiff answered, "You know the price of the annuity was paid you in a 1000*l.* bank-note, which you changed at *Badcock's*." The Defendant made no answer: Held, that this was not a sufficient acknowledgement of the debt to deprive the Defendant of the benefit of his plea of the statute of limitations.

THIS was an action brought to recover the charges for business done by the Plaintiff as an attorney in conducting the sale of an annuity for the Defendant. The Defendant pleaded the statute of limitations. Upon the trial of the cause, at the *Taunton Lent* assizes, 1817, before *Burrough, J.*, the evidence for the Plaintiff was, that the business was done, and that within six years past the Plaintiff having applied to the Defendant for payment, the latter said, "I thought I had paid it at the time, but I have been in so much trouble since that time that I really do not recollect it." The Plaintiff replied, "You know the price of the annuity was paid you in a single bank-note for 1000*l.* which you changed at *Badcock's* bank." The Defendant made no reply. A witness who was present at the execution of the annuity deeds proved that the Defendant received at that time the whole 1000*l.*, the consideration of the annuity, and that he did not at that time pay the Plaintiff his charges. The inclination of the learned Judge was; that this was not sufficient to take the case out of the statute of limitations; and he

proposed

proposed that a verdict should be taken for the Defendant, reserving the point whether this were or were not sufficient to exempt the debt from the *operation of the statute, and that the jury should say, whether the money had or had not been paid at the time of granting the annuity. The jury found that it had not been paid.

Pell, Serjt., had in *Easter* term obtained a rule *nisi* to set aside this verdict for the Defendant, and enter a verdict for the Plaintiff, against which,

Lens, Serjt., showed cause. The cases on the statute of limitations have gone too far. The true line is, that where the Defendant means to say, "I rely on the embarrassment you will have to prove your case, though I believe the debt was never paid," there the statute shall not protect, but where he says, "relying that the debt was paid, I have discharged my mind of the transaction, and burnt my memoranda," there he shall not be charged, *Coltman v. Marsh* (a). "I owe you not a farthing, for it is more than six years since," he does not say that he never owed, nor that he has paid, but that the time is past, *Bicknell v. Keppel* (b). "I refer you to my solicitors, whose opinion always governs me: they are in possession of my determination and my ability;" and it was argued on the term "ability," that he disclosed his consciousness that if he had any means of paying, he ought to pay; but neither that ground, nor the solicitor's letter, which stated that "if the Plaintiff had any letter to bind the Defendant, the debt would be paid," was held sufficient. In the case of *Truman v. Fenton* (c) Lord *Mansfield*, C. J., puts it, that if a Defendant say, "I am ready to account, but nothing is due to you," there the Defendant shall be bound; but in that case the Defendant puts himself on the balance of the account; but here he says, "I thought this demand had been settled at the time of my receiving the price of the annuity, but I have been in so much trouble since, I really do not recollect it." When the Plaintiff says, "You know you was paid by a 1000*l.* note, which you changed at *Badcock's*," the Defendant rejoins nothing, and therefore admits nothing, it is equally probable, it might have been paid notwithstanding, by a counter-payment. The party puts himself on the failure of his memory. This is clearly within *Coltman v. Marsh*.

Pell, in support of rule. The Defendant has nothing to rely

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(a) *Ante*, III. 380.(b) 1 *New Rep.* 20.(c) *Comp.* 548.

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on but *Coltman v. Marsh*. That is a simple denial of the debt. "I do not owe you a farthing;" and though he chooses to add, "For it is more than six years since," yet that matters not: it may be paid *aliunde*. This case of *Coltman v. Marsh* is opposite to all principle: the statute does not destroy the debt, but takes away the remedy. It was meant to protect, not persons who had not paid their debts, but those who have paid them, and have lost the means of proving they have paid them. The printed report is very short, and it is impugned by *Leaper v. Tatton (a)*, where he acknowledged, that it was his acceptance, and said "that he had been liable, but was not liable then, because the bill was out of date;" he would not pay it, and it was not in his power to pay it; yet he was held liable. Suppose a Defendant had said, "I have paid you, and I have got your receipt for the money;" if the Plaintiff could show that the Defendant had not got the receipt, it would take the case out of the statute; and, which is stronger, it lies on the Defendant to show he has the receipt. *Craig v. Cox (b)*. It was monstrous to contend, the words were sufficient; "Sir, as soon as I am able to attend to my concerns, I will wait on Captain *Craig*, whom I shall be able to satisfy respecting the little misunderstanding which has occurred between us." The facts of this case are, the Defendant said, "he thought it had been settled *at the time when the annuity was granted*." The Plaintiff says, "You know you was paid the consideration-money in a 1000*l.* bank-note." In fair reasoning, it must be taken, that the annuity was granted when the consideration-money was paid; and that it means that the debt was paid at this particular meeting, and then it comes precisely within, and is a promise to pay the debt, the alleged fact failing the defendant. *Partington v. Butcher (c)*. There the Defendant referred to an instrument as discharging him. When examined, it did not show his discharge. *Mansfield, C. J.*, held that though he had a right to have his whole admission taken together, the Court had the same right to see whether he was discharged by that instrument or not. Where a party advances an allegation to falsify the debt, and the fact is not so, he admits the existence of the debt; and the promise to pay, as a matter of law, arises upon it. Some of these cases are conflicting. The Court ought to lay down a settled rule.

Lens, who would have replied on the two cases last cited, was relieved by the Court.

(a) 16 *East*, 420.(b) 1 *Holt*, 380.(c) 6 *Esp.* 66.

GIBBS, C. J. We have in the first place the strong inclination of the Judge, that this conversation did not take the case out of the statute. I agree, that if the Courts could retrace their steps, and could see all the consequences that have arisen, they would have seen it better to adhere to the precise words of the statute, than to attempt to relieve in particular cases. There are three cases in which the words of the statute would discharge the Defendant, but in which the Courts have held him liable. One is, where the Defendant has admitted that the debt is unpaid, but has stated that it was discharged by the lapse of time; another is, where the Defendant has stated not that the debt remained due, but that it is discharged by a particular means, to which he has with precision referred himself, and where he has designated that time and mode so strictly, that the Court can say it is impossible it had been discharged in any other mode: there the Courts have said, "If the Plaintiff can disprove that mode, he lets himself in to recover, by striking from under the Defendant the only ground on which he professes to rely." A third case is, where the Defendant challenges the Plaintiff to produce a particular mode of proof of his liability: there, if the Plaintiff produces that proof, the Courts have said "the Defendant shall not be discharged," though the statute says he shall be discharged. I have not examined the particular cases here, and I think they are not easily to be reconciled: this is referable to the second, if to either of these cases, but I do not think it is taken out of the statute. The party applied to refers to this, as a very stale demand: he thought it had been paid at the time, but he does not precisely recollect: and his memory is impaired by misfortunes. I cannot think that this precisely puts it upon the issue, whether he paid it at that particular time, and an acknowledgment that if it was not paid then, it remains unpaid. I cannot therefore think this is such an acknowledgment as takes the debt out of the operation of the statute.

DALLAS, J. The grounds of private justice and public convenience are, that actions should be brought within a certain reasonable time, and that Plaintiffs should be urged to use due diligence, and that a Defendant should not be under the necessity of preserving his vouchers beyond a due time, and how would they accumulate if he did! and his witnesses will die. But if there be a clear acknowledgement of the debt at any distance of time, it ought to suffice, to enable the Plaintiff to recover, and the Defendant has had the use of the money for the time.

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time. But where a man says that his embarrassments and misfortunes have impaired his memory, but he believes it was paid at the time, that cannot be deemed to take the demand out of the operation of the statute of limitations. At the same time, I agree with what has been urged by the counsel for the Defendant, that the late cases have much tended to correct the latitude of the former cases, and that most wisely.

PARK, J. After the able and luminous manner in which my Lord Chief Justice has classed the several cases which have been decided on this statute, I shall not add one word more on that subject; but I may observe, that this case does not range itself within the class to which the counsel for the Plaintiff with much acuteness labours to refer it.

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BURROUGH, J. I agree in the argument for the Plaintiff, that the words "I thought I had paid it at the time of granting the annuity" do not necessarily mean at the very moment of paying the purchase money, but about the time of granting the annuity. But when the Defendant says, "I have forgotten all about it, I thought I had paid it then;" it certainly cannot be taken, that a man who has forgotten all about it, positively says that he did pay it then, and so brings himself within the rule, within which the Plaintiff's counsel very acutely endeavoured to bring it, of challenging a certain test of time and place of payment. Common sense and all the practice of our Courts are adverse to this construction. I therefore concur that this rule must be

Discharged.

June 20.

MOORE v. The Right Hon. OTHER ARCHER, Earl of PLYMOUTH.

An exception in a conveyance, made in 1655, of the free liberty of hawking and hunting, does not include the liberty of shooting feathered game with a gun.

Semble, that the liberty of hawking and hunting for the grantee, his friends, and servants, is a tenement and entailable.

IN trespass, the Plaintiff declared that the Defendant, on the 1st of *January*, 1810, and on divers other days, broke and entered his three closes situate in the parish of *Bordesley*, in the county of *Worcester*, naming them, and forced open and broke his gates there standing, and the locks, &c. thereof, and with his own and his dogs' feet, trod down and spoiled his grass and corn there growing, and with dogs and guns hunted and searched in the said closes for, and shot at hares, *pheasants*, *partridges*, and other game, being in the said closes, and killed divers, and carried away and converted them to his own use. The se-

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cond count was, trespass for forcibly seizing, taking, and carrying away the Plaintiff's hares, pheasants, and partridges. The Defendant pleaded, first, as to breaking and entering the said three closes, and with feet in walking, treading down, and spoiling the grass and corn of the Plaintiff, therein then growing, and with the said dogs and guns *hunting* and searching therein, *for hares, pheasants, partridges*, and other game, and shooting off and discharging the guns so loaded with gunpowder and shot, at and against the hares, pheasants, and partridges, found and being in the said closes, and killing and destroying the hares, pheasants, and partridges being upon the said closes, and carrying away, and converting, and disposing thereof to his own use, and thereby encumbering the said closes, and hindering and preventing the Plaintiff from having the use, benefit, and enjoyment thereof in so large and ample manner as he might and otherwise would have done; that the said three closes at the said several times when, &c., were and now are part and parcel of the premises in these pleas hereinafter mentioned, and in the indentures in this plea herein mentioned and referred to more particularly described; and that heretofore, and before the times when and before the making these indentures, to wit, on 27th February, 1755, the Right Honourable *Thomas Windesor*, Lord *Windesor*, being entitled to the equity of redemption of and in the premises in and by the indenture next herein mentioned, conveyed, and *John Langham* of *Cotteybrooke*, in the county of *Northampton*, Esq., and *Stephen Langham* of *London*, merchant, third son of the said *John Langham*, being seised in their demesne as of fee, subject to the said equity of redemption, of and in the premises, by indentures of lease and release between Lord *Windesor*, of the first part; *J. Langham* and *S. Langham*, of the second part; and *Thomas Foley*, of *London*, Esq., and *Richard Jones*, of *Putney*, in the county of *Surry*, Esq., of the third part; Lord *Windesor*, and *J. Langham*, and *S. Langham*, at and by the entreaty and appointment of Lord *Windesor*, for the considerations in the said indenture mentioned, granted, bargained, sold, aliened, released, and confirmed, unto *T. Foley* and *Jones*, and the heirs of *Foley* for ever, all that park or enclosed or impaled ground, called or known by the name of *Bordesley*, otherwise *Borsley* park, together with divers other premises in the said first mentioned indenture particularly mentioned and described, and among others the several closes in which, &c. Excepted, and always reserved out of that grant, free liberty of hawking and hunting

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hunting in, over, and upon any of the premises, for Lord *Windesor*, and the heirs of his body, and his and their friends, servants, and followers; and that the premises whereof the several closes in which, &c., are parcel, by mesne assignments, afterwards, and before the time when, &c., came to and vested in one *Henry Geast*, that *Geast* demised the places in which, &c., amongst other premises, to the Plaintiff; that the Plaintiff by virtue of such demise became, and at the time when, &c., was the tenant of *Geast*, of the several places in which, &c.; that he the Defendant at the times, when, was, and now is heir of the body of Lord *Windesor*, and by reason thereof, and of the premises, did, in the exercise of the free liberty so excepted and reserved out of the said conveyance of hawking and hunting in, over, and upon the premises whereof the closes in which, &c., were and are parcel, commit the several supposed trespasses in the introductory part of this plea mentioned, as he lawfully might, for the cause aforesaid. The third plea stated the conveyance of 1755, as a grant by the *Langhams*, at the appointment of Lord *Windesor* to *T. Foley*, omitting to aver the grantor's estate, and Lord *Windesor*'s seisin of the equity of redemption, and justified as in the second plea. Fourthly, the Defendant pleaded a license. The Plaintiff demurred to the second plea, and assigned for causes, that whereas the said Defendant thereby had professed to justify all the trespasses in the first count, under the reservation in the grant by Lord *Windesor* in that plea mentioned, *viz.* the free liberty of hawking and hunting in, over, and upon those closes for Lord *Windesor* and the heirs of his body, and his and their friends, servants, and followers, yet the Defendant had not by that plea justified the hunting and searching with the dogs and guns in the said closes, for the hares, pheasants, partridges, and other game, discharging the loaded guns, and shooting at the hares, pheasants, and partridges found in the closes, nor the killing and destroying the hares, pheasants, and partridges, being in the closes, and in the first count mentioned, inasmuch as the reservation to hunt and hawk so reserved, did not justify the hunting and searching with dogs and guns for the hares, pheasants, partridges, and other game, nor the discharging the loaded guns at the hares, pheasants, and partridges, nor the killing nor the destroying the pheasants and partridges in the first count mentioned, nor the said hares in that count mentioned, otherwise than by hunting the same. And he traversed the license stated in the fourth plea.

Blosset,

Blosset, Serjt., in support of the demurrer, urged, First, that the reserved right to hawk and hunt, if good at all, was good only for the life of Lord *Windesor*, but void so far as it was a limitation to the heirs of his body. Secondly, that the reservation was void, as being made to persons who were strangers to the estate in the land. Thirdly, that the liberty to hawk and hunt did not include the entering and destroying partridges, pheasants, and other feathered game, by shooting it with guns.

As to the first point, this is a mere personal privilege, carrying with it no interest in the land, nor any profit to be derived out of the land. It is like the exception of a way, and many other easements of the same nature, which are good as personal grants, but not in gross; nor do they become transmissible or assignable, unless made appendant, appurtenant, or otherwise annexed to land (*a*). It is therefore a question, how far a personal right like this to one person to shoot over another man's ground, can be granted to a man, and the heirs of his body. This is not such a tenement or interest as is entailable (*b*). If, though not entailable, it can otherwise be settled on a man, and on the heirs of his body, it is a conditional fee at common law; and the condition being performed by the first Lord *Windesor*, by his having heirs of his body, he was at liberty to alienate this right. This shows, that because it is not transmissible, yet it is transmissible; and so, on account of the absurdity, it cannot be so limited (*c*). If an interest were granted to a man, and his heirs, to enter the grantor's kitchen and eat his dinner, it would not descend to the heirs, nor can it be granted over. So, a license to hunt, whether to take a pheasant, sparrow, or bee, matters not. No one instance is found, of a grant of a license to a man, and the heirs of his body. If it be argued, that though not assignable, it is descendible to Lord *Windesor*, and the heirs of his body, so long as they endure, then it is void, because it is *quodam modo* a service annexed to the land, and therefore bad by the statute *Quia emptores* (*d*), *Bradshaw v. Lawson* (*e*). A copyhold was enfranchised by feoffment, reserving to the lord a rent stated to be the ancient rent, and a covenant was executed by the grantee, to pay to the grantor the ancient rents and services, held that the covenant was void by the statute *Quia emptores*. There is no difference between enfranchisement on the reservation of ancient services, and a grant

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(*a*) 2 Bl. Com. 35.(*c*) Bro. Abr. 64. License, pl. 10.(*d*) 18 Edw. I. st. I.(*b*) Litt. s. 13. Co. Litt. 20. a. 206.(*e*) 4 Term. Rep. 447.

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with a reservation of new services. So, neither can this reservation be annexed to an old estate. A reservation may *be bad for uncertainty, as a custom to play cricket in certain ground. *Fitch v. Rawlings* (a). So this reservation is not confined to Lord Windesor, and the heirs of his body, but extends to his and their friends. It never can be an issue, whether A. or B. is Lord Windesor's friend, and therefore, not being limited to his friends in company, or the like, is too general.

Next, the reservation is void, as being made to strangers to the deed (b). The law can take no notice of an equity of redemption; and therefore Lord Windesor is a stranger to the fee. In a lease and release, being a grant of an estate by a mortgagee, the mortgagor joined, and had a reservation to himself of the right to dig coals, and it was held that the reservation was void. It was, in fact, a covenant of the relessee, that the mortgagor might dig for coals, but notwithstanding that covenant, the Court held the reservation void. The covenant, *Lawrence, J.*, says, could only operate as a grant; but a grant will not pass the land itself without livery. *Cheetham v. Williamson* (c). So here, this is void as a grant, for want of livery. In *Mountjoy's* case (d), there cited, it was held that an interest to enter and dig coals, is an interest in the land.

As to the third point, the liberty to hawk and hunt does not extend to shooting, *i. e.* to entering a man's land for the purpose of destroying partridges and pheasants with guns. This sort of licenses is to be construed strictly (e). It is to be considered, that in fact both guns, and the shooting and sporting with guns, were familiar to persons of distinction, long before the date of this deed. The statute 33 *Hen.* 8. (f) interdicts low persons from shooting with guns. The statute 3 *Edw.* 6. (g), forbids any under the degree of a lord from shooting with hail shot, or more pellets than one. There is a very good reason why a person who gives such a permission to hunt, should not license shooting, though he might permit hawking and hunting; for shooting is more destructive to the game, and more dangerous to the owner of the estate, if the heir of Lord Windesor's body happened to be an awkward sportsman. The statute 4 & 5

(a) 2 *H. Bl.* 393.

(b) *Shep. Touchst.* 80.

(c) 4 *East*, 469.

(d) *Godb.* 17. *Co. Litt.* 164. b. 165., a., and *Harg. note* 5. 1 *Anders.* 307. *Mo.* 174.

(e) *Manw.* 8vo. last edit. 188. found c. 18. s. 3. p. 125. of edit. *Lond.* 1615. 4to.

Vin. Abr. License, C. D.

(f) 33 *H. 8.* c. 6:

(g) 3 *Edw.* VI. c. 14., repealed by stat. 6 & 7 *W. 3.* c. 13. s. 3.

W. & M. (a) prohibiting inferior tradesmen from hunting, hawking, fishing, and fowling, may by "fowling" mean netting the birds. If hunting includes shooting, it also includes netting, the most destructive of all modes of taking them.

Lens, Serjt., *contra*, first addressed himself to the last head. Hunting is the most generic name; it would include hawking; and if hawking had not been so grand a distinction, no doubt it would have passed by the term "hunting." The grantor has not said whether it be the hunting of beasts or of birds, which he excepts. Hunting is used in the latter sense by our best writers. "A hunter *Henry* is, when *Emma* hawks." "A sequestered stag who from the hunter's aim had ta'en a hurt." *Henry* the Second was killed by the arrow of a hunter; that was the original mode of hunting. There is danger too in hunting with dogs: witness *Actæon's* fate. This is but an indulgence coupled with an interest: the grantee wants nothing but a license to enter the lands; no interest in the soil is wanted, and though, if it be necessary, as in *Cheetham v. Williamson* to except an interest in the lands or a grant out of the lands, it might be insufficient, yet that is not here wanted. The statute of *Hen. 7.* (b) against the taking of pheasants and partridges, recites, that "the owners leese not only their pleasure and disport, that they, their friends and servants should have about hawking, hunting, and taking of the same" (thus applying the term hunting to winged game, pheasants and partridges). The art of shooting birds flying could not have been very successfully pursued with the matchlocks and demi-culverins which were in use at the period of this grant.

Next, this license is not restricted to Lord *Windesor* for life, this is an interest which may be entailed within statute *de donis*; but if not, it will be a fee-simple conditional; and though alienable by performance of the condition, the grantee is not bound to alienate it; and if he alienates it not, he still has the conditional fee in him, though not restrained from alienating by the statute *de donis*. It has been argued that this is no more than a way, and an easement, which dies with the grantee, unless attached to land. The Plaintiff's counsel does not illustrate how it is that a right of way to a man and his heirs may not exist, though not assignable. An annuity to a man and his heirs is not entailable, yet it is assignable; no analogy exists between the two qualities, each must be kept within its own limits. Next,

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(a) 4 & 5 *W. & M. c.* 23. s. 10.(b) 11 *H. 7. c.* 17.

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this is within Lord *Coke's* comment, a tenement (a). "Tene-ments, *tenementa*. This is the only word which the statute of *W. 2.* useth, that createth estates tail, and it includeth not only all corporate inheritances which can or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure; therefore all these without question may be intailed." This is a privilege exercisable within lands, within the lands conveyed. It is no right to any thing personal, or exercised about chattels (the test by which *Co. Litt.* distinguishes the matters which are not entailable). *Roll.* (b) also marks the distinction between those things which are purely personal and those things which, though of a personal nature, are to be exercised within land. *Neville's* (c) case, a dignity may be entailed, though it cannot be assigned, as the earldom of *Northumberland*. And it may be forfeited, though a more distant connexion between two things cannot be imagined, than between title and the land in the county of which it is named. *Davis's* case (d). Held a good prescription for a right for all the tenants and farmers of the lord of a manor to fowl within the Plaintiff's free warren. The lord may prescribe for his tenants; if the land be copyhold and the right be claimed as a custom, the lord must prescribe; if the freehold be in the tenant, the tenant must prescribe. Possibly these might be freehold tenants; and it was held that *aucupium, avium captio*, was a profit *apprendre* in *alicui solo*, which tenants might have, as tenants, in their own character, and so, not altogether unconnected with the manor (e). "The same law is, if a man license me and my heirs to come and hunt within his park, it behoves me, or is convenient (*covient*), here to have a writing of this license, because a thing passeth by this license, which is to endure to perpetuity; but if he license me to hunt once in his park, this is good without writing, because no inheritance passes." So, if it were to him for his life; that might always be pleaded without showing written license. From the circumstance stated in the third plea, of Lord *Windesor's* consenting to the grant by *Langham* it must be presumed he had an interest of some sort; for the grantee has accepted a grant in which Lord *Windesor* is an acting party, and the grantee, it must be presumed, would not have required or consented there-

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(a) *Co. Litt.* 19 b. 20 a.(b) 1 *Roll. Abr.* 837. line 50. citing *Manxel*, 2. & 3. (the Supplement to *Flouid.*), and *Nevill's* case. (c) 7 *Co.* 33. b. (d) 3 *Mod.* 246. (e) 11 *Hen.* 7. fol. 8. b.

to, unless Lord *Windsor* had had an interest. And though he purports to exercise a power of appointment, yet if he has an interest, his interest shall pass. But here is wanting no more than an excuse for coming on his land; and though Lord *Windsor* has given it in an informal way, it shall operate as a license, though not in terms an interest. For the purpose of this act a grant is not necessary, a mere consent suffices; and yet a grantee to some purpose is a grantor, and re-grants a thing now in substance created for the first time. It is said, this is a creation of holding of lands by service, created since the statute *quia emptores*. This is no new holding: the privilege granted, and the land over which, are both held of the same lord. The case bears not the most distant resemblance to *Bradshaw v. Lawson*, where a reservation of the ancient rent would have enured to create a new holding. The argument, that this would become a feudal relation, loses sight of the nature of the thing; no homage, no feudal service is to be done here. Lord *Windsor's* friends must be the friends accompanying him at the time, and a stranger coming could not protect himself as Lord *Windsor's* friend. Even if the term "friends" were too vague, still that would not avoid the grant, so far as it was to Lord *Windsor* and the heirs of his body (though the interpretation is obvious, that they are such as make part of his friendly retinue). The circumstance of its being a grant to a man and his servants, shows that he has an interest in the game (a). If he has a license for him and his servants to hunt at his pleasure, he may also kill and carry away; for the license for the servant imports an interest in the thing. But a license to enter and kill, does not authorize to take away, but only to sport. A receivership of a manor, as it is held in *Manxell's* case, may be entailed, for it is within the statute *de donis*, for it is to be exercised in land; so is this therefore a matter which either may be entailed, or limited as an original fee-simple conditional; it cannot therefore be considered as a matter purely personal. This is no part of Lord *Windsor's* old estate, but he is the grantee of a grantee of a new matter which is not a part of his old estate, but the grantee agrees that he shall have it: for it appears on the pleadings that the deed is sealed with the seal of *Thomas Foley*.

Blosset, in reply. First, This cannot be made available as a grant, for it is not pleaded as a grant. Secondly, it cannot enure

(a) *Co. Dig. Chase*, H. I. *Manw.* cited as 279, 280., found c. 18. s. 5. p. 129. of 4to. edit. *London*. 1615.

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as a grant, because it is by bargain and sale, which only passes an use. Thirdly, an easement to enter for a particular purpose, as to sit at a cotton mill, is no tenement, as hath been held in settlement cases, though it be profitable to the grantee. The distinction adverted to appears in *Fitch v. Rawlings*, that legally settled inhabitants might play at cricket, but inhabitants for the time being could not: but this description of "friends" is too general, and, being too general, it destroys the whole: for the reservation cannot be good in part, and bad in part. The argument drawn from the statute *Quia emptores*, is not that the lands are holden by the grantee by the service of suffering Lord Windesor to sport on this land, but that the statute *quia emptores*, precludes the creating new charges of this nature on land, as well as alienations of land on new services. [*Curia contra.*] On the reservation to Lord Windesor and his servants, the authority cited from *Co. Dig. (a)* affords an answer to several other authorities cited from ancient books; the words are, "the license for the servants imports an interest in the thing, not in the land." Warren, chase, and park, are incorporeal hereditaments, and a grant thereof conveys an interest in the thing, *i. e.* in the game, not in the land. And a warren, park, or chase, may be granted to a man and his heirs, but there is no instance that an easement may be granted to a man and his heirs. In 3 *Mod.* it is in a warren. That which is granted to a man and his heirs in a park, must be a perpetuity, and must be by deed. The case cited is of a license to one and his heirs, to hunt in my park, not in my land. It is said this, though not a regular grant, is an assent by the grantees; if so, it ought to have been pleaded as a license by the original grantee; but it is impossible that an assignee of the land, after so many hundred years, can be considered as now licensing, or bound, by this license. So far as there is an interest in the game, in warren, park, and chase, it may perhaps be grantable to a man for life. But it is otherwise of an entry into the land to hunt. This has been assimilated to the case of dignities, and it has been argued, that because a dignity has no connexion with the land except the name, therefore every easement which has a closer connexion with the land than a dignity has, may be entailed. If so, there is no easement, and scarce any thing that can be named, which cannot be entailed. An annuity cannot be entailed, but it can be limited to a man and his heirs, because it is a profitable

(a) *Co. Dig. tit. Chase, H. 2.*

thing;

thing; but here is no profit, and no instance can be found of any thing being entailed, which is not a matter of *profit. Any thing descendible and entailable is assignable, otherwise it would create a perpetuity, and it would be *quodam modo* a service issuing out of land, and so is void. It has been argued, that though not good for passing an interest in land, it might be good as reserving something out of the land, though Lord *Windesor* had no estate; but there is no authority that a person having only an equitable interest, who, it is clear, could not reserve a parcel of the land itself, can reserve an interest out of the land. Hunting is capable of two acceptations: it may mean the pursuit of all game; it may mean only pursuing of beasts with a number of dogs; but the question is, in what sense it is used here. The statute *H. 7.*, speaking of hunting for pheasants, does not help the Defendant; for one may hunt for a pheasant, and though the art of shooting game on the wing was not known at the time when this grant was made, that does not help him, for a grant must be construed strictly, and confined to the modes of *aucupium* then known.

Cur. adv. vult.

On this day *Gibbs*, C. J., delivered the judgement of the Court. His lordship first stated the pleadings, and observed, that the material part of the deed set out, was the exception. The plea in substance is, that the Defendant went to shoot pheasants and partridges, under the privilege reserved by this deed. Several objections have been urged against this plea. First, that the reservation is not to persons from whom the estate moved. To this it is answered, that the deed may operate as a grant; and that although it may not be good as a reservation, yet being sealed with the seal of all the parties, it would operate as a grant to Lord *Windesor*, and the heirs of his body; and that it was more than an easement, seemed admitted, because it was to himself, his heirs, and servants. The case has been extremely well argued, and I doubt not but that all the authorities were brought before us. But there is another point in the case, supposing this to have its full operation, whether as a grant or a reservation, whether it extends to shooting, and we think it does not; that the word hunting does not, in its fair acceptation, extend to shooting feathered game. If one were to give leave to another to hunt over his premises, it would not give him the liberty of shooting there; and many would give another liberty of hunting over their premises, who would be extremely annoyed if he went shooting

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shooting there. Therefore we are of opinion, that the Defendant is unjustified by his plea; and that there must be

Judgement for the Plaintiff. (a)

(a) See *Manw. c. 18. §. 10.* "Of the signification of these two words hawking and hunting." p. 136. in 4to. edit. *Lord.* 1615.

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Where the owner of a ship, by his contract, places the entire vessel for a time under the sole controul of the freighter, during that time any act of the owner of the vessel, done in fraud of the freighter, is an act of barratry.

The words "let to freight and hire" are not essential in order to constitute the freighter sole owner for the time.

A covenant by the owner to carry 100 tons for the freighter from P. to O., at 6*l.* per ton, and a covenant by the freighter that the commander might fill up the vessel with any other goods on freight, the commander agreeing that the freighter should have the preference of shipping the other goods: if the freighter fills up the vessel, he becomes complete owner for the time, and a loss by the act of the original owner is a loss by barratry.

THIS was an action of *assumpsit* on a policy of insurance upon flax, valued at 5200*l.*, at and from *Pernau* to *Oporto*. In all the counts, the interest was averred to be in the Plaintiffs. In the first count the loss was averred to be by the barratry of the master. * In the second count, by certain perils, losses, and misfortunes, which came to the hurt, detriment, and damage of the goods. And in the third count, by perils of the seas. At the trial before *Burrough, J.*, at the *London* sittings after *Hilary* term, 1817, the jury found a verdict for the Plaintiff, for 500*l.* damages, subject to the opinion of the Court upon the following case. The plaintiffs, on the 20th *February*, 1816, entered into a sealed charter-party, expressed to be between *Jozè de Fontes* commander of the *Portuguese* brig *Jozè and Maria*, then in the port of *London*, and the plaintiffs, freighters of the said brig, whereby *Fontes* covenanted, that the brig being tight, staunch, and substantial, and every way properly fitted, victualled, and manned, as is usual for vessels in merchants' service, and for the voyages thereafter mentioned, should immediately take on board in *London*, from the freighter, seventy tons of flax, and five tons of hemp, and therewith proceed direct to *Figueira*, and give notice of her arrival to the agents there of the freighter, and deliver the flax and hemp, agreeably to bills of lading, and with all despatch sail direct to *Pernau*, and there take on board, from the said agents or assigns, 100 tons of flax (together with the other goods thereafter mentioned), and therewith sail direct to *Oporto*, and there deliver the whole 100 tons of flax, agreeably to bills of lading, and there end the voyage. And the commander agreed, that the brig should lie at *Pernau* for the purpose of receiving the 100 tons of flax, twenty running days in the whole, to commence on 10th of

April

April then next, provided the brig should then have arrived at *Pernau*, and be ready to load on or before that period; otherwise the lay days to commence from the day on which the brig should arrive at *Pernau*, being ready to load, and notice thereof given: that the vessel should go addressed to the agents or assigns of the freighter, at her ports of loading and discharge; and the freighter covenanted, at his own costs, to send the seventy tons of flax and five tons of hemp alongside the said brig in the port of *London*, and to send the 100 tons of flax alongside the brig at *Pernau*, within the day thereafter limited, or days of demurrage thereafter granted; and to receive the 100 tons of flax from alongside the brig at *Oporto* with all despatch, and to pay for the freight or hire of the brig for the voyage, 2*l.* 10*s.* from *London* to *Figueira*, for every ton of flax or hemp there delivered, with 5 *per cent.* primage, and from *Pernau* to *Oporto*, freight at 6*l.* *per* ton for the flax there delivered, with 5 *per cent.* primage; that the whole freight and primage from *London* to *Figueira*, and from *Pernau* to *Oporto*, should be paid as follows; viz. 300*l.* to be advanced previous to the brig sailing from *London*; but in the event of the loss of the vessel during the voyage, the 300*l.* to be returned, the remainder of the freights and primage to be paid in cash forthwith on the freighter receiving advice of the delivery of the flax at *Oporto*: provided, and the freighter agreed, that the commander should have liberty, without prejudice to that charter-party, to receive any goods on freight on board the brig at *Figueira* for *Pernau*, and there deliver them; for loading such goods, the commander was to be allowed fourteen running days from the brig's arrival at *Figueira*; and in such event, the commander agreed, that the goods should be delivered at *Pernau* within eight running days after arrival there; provided further, and agreed, that the said commander might, without prejudice to that charter-party, complete the loading of the brig at *Pernau* with other goods, on freight, over and above the 100 tons of flax: and in such case the commander agreed, that the agents or assigns of the freighter at *Pernau* should have the preference of shipping the other goods, they paying freight for the other goods in proportion to the stipulated rate of freight for the 100 tons of flax; and the commander agreed, that the vessel should not be detained at *Pernau* any longer time over and above the lay days allowed for loading the 100 tons of flax, than should be necessary for stowing the remainder of her cargo; that the freighter might keep

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keep the vessel on demurrage at *Pernau* fifteen running days over and above the lay days, at 3*l.* per day; and by a memorandum, previous to the execution, it was further agreed, that the freighter should send the one hundred tons of flax alongside the brig at *Pernau*, the expense to be paid by the freighter, or commander, agreeably to the custom of that port, and that the commander should send the one hundred tons of flax to the quay of *Oporto*, at his own expense. *Fontes*, described in the charter-party as the commander, was in fact also the sole owner of the *Jozè and Maria*; the Plaintiff, pursuant to the charter-party, shipped in *London* the seventy tons of flax, and the five tons of hemp, and the vessel, with that cargo, in the beginning of *March* proceeded to sea under the command of one *Gouvea*, *Fontes* remaining in *England*, and arrived on 26th *March* at *Figueira*, whence, after discharging her cargo, she proceeded in ballast to *Pernau*, where she received on board, on account of the Plaintiffs, six hundred and thirty-four bales of flax, which filled her. After lading this cargo, the *Jozè and Maria* sailed for *Oporto*, and in the course of her voyage put into *Deal*, in order to repair a leak occasioned by bad weather. While the ship lay at *Deal*, *Fontes* the owner came on board, when he proceeded to sea, and took the management of her, and directed her course, and on the 10th *October*, wilfully run her on shore, *Gouvea*, the captain, being privy thereto, and concurring therein, and the ship was lost; the cargo was landed on the coast of *France*, one-half of which was greatly damaged by sea-water. The Plaintiff, on receiving advice of the arrival of the *Jozè and Maria* at *Pernau*, effected the policy in question, which the Defendant subscribed, for 500*l.* On the 26th *October*, the Plaintiffs received notice of the loss, and on the same day gave notice of abandonment to the Defendant. The question for the opinion of the Court was, whether the Plaintiff was entitled to recover; if the Court should be of opinion that he was entitled to recover, the verdict was to stand; if not, the verdict was to be set aside and a nonsuit entered.

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Best, Serjt., for the Plaintiff, contended first, that the ship was destroyed by the barratry of the master; and that though he was sole owner of the vessel antecedent to the voyage, yet the Plaintiffs must be considered as owners during the voyage, and so the act of the master without their consent was barratry. He admitted that if a master who is also owner commits barratry, no action could be founded thereon, but that principle was not here

here applicable. The principle is, that a person cannot recover for a loss which himself has occasioned, and therefore that the master cannot recover for a loss occasioned by barratry, which is the act of the master. This principle is applicable to every case which has been decided. In the early state of commerce, the same person was merchant and ship-owner, and often captain. That law therefore was necessary to prevent any one from recovering by his own misconduct: but when the person transporting the goods ceased to be the person navigating the ship, it was necessary that the law should be altered and accommodated to the existing state of things; therefore when the merchant transporting the goods became a different person from the owner of the ship, the person transporting the goods was, as the temporary owner, allowed to recover for the barratry of the permanent owner of the ship. *Vallejo v. Wheeler* (a) is not distinguishable from this case; which does not fall within the case of *Nutt v. Bourdieu* (b). In *Vallejo v. Wheeler* there is a mistake in stating the fact that *Darwin* let the ship to freight, who chartered her to *Brown*; the facts are transposed, as may be seen in the judgement of *Buller, J.*, in *Nutt v. Bourdieu*; in *Vallejo v. Wheeler* it was determined that the owner of the goods, though he had no connexion with the owner of the ship, was not entitled to recover. So, in this case, the person who committed the barratry was originally the owner, but he is not the owner throughout, and, as Lord *Mansfield* there says, *Willis* may be laid out of the case, for that if any fraud was committed, it was committed on *Darwin*. Barratry can only be committed against the owner of the ship. The owner of the goods has nothing to do with it; if the owner of the ship assents to an act it is not barratry. Barratry does not bear relation to the person who effects the insurance, and wants to sue the under-writer, but respects the owner of the ship; thus has it hitherto been held: but the law is enlarging itself on this point. *Vallejo v. Wheeler* was the first case; the Plaintiff comes within that case, he is owner of the ship *pro hac vice*. She is to sail when he pleases, to be kept as long as he pleases, for a certain period, without paying any thing, and after that period, then at certain demurrage *per day*. "The ship being despatched," by whom? "By the Plaintiff." So this becomes distinguishable from the case of a part-freighter, or general ship, where the time of sailing depends on the master. Here the Plaintiff exercises that controul which

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(a) 1 Cowp. 143.

(b) 1 Term. Rep. 323.

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an owner alone exercises. At *Pernau* the master is to address to the assigns or agents of the freighter, to take on board a hundred tons of flax, and the time of sailing thence is to be directed by the Plaintiff's agents; so that he cannot stir thence, till the Plaintiff orders him: he is then to proceed with the cargo to *Oporto*, and there end the voyage; here, then, is a hiring of the vessel for the voyage. If the hundred tons of flax, indeed, were not sufficient to load her, the commander was at liberty to take in goods from other persons. But if the vessel were not the Plaintiff's, he would have been at liberty to do that without consulting the freighter. No part, therefore, more strongly than this, shows that the master was to do this for the benefit of the freighters. He is to be *allowed* eight days only for this, not *ad libitum*, as he would if the ship were still his. The direction and controul of this ship is therefore to be in the freighters also. In the case of *Tate v. Meek*, now in the paper for argument, the charter-party is in the same terms; the privilege of filling the ship is in substance a letting of the ship, inasmuch as no other can use the ship without the Plaintiff's consent. The terms of the charter-party in *Vallejo v. Wheeler* do not appear, but the Court will look to the substance: if the effect be to put the entire controul of the ship in the freighters for the voyage, it is a letting to hire. In justice the Defendant ought to pay, because this loss is brought about by the act of a person over whom the Plaintiff had no controul. It is the policy and spirit of insurance law, to effectuate these contracts to the uttermost, and it appears that in substance and effect the Plaintiffs are the owners of the vessel for the purpose of this policy. The case which will be cited, *Nutt v. Bourdieu*, is distinguishable from the present, for there the plaintiffs had no controul over the vessel. But, secondly, effect must be given to the words in the policy "all other losses and damages which shall happen and come to the ship or merchandises, or any part thereof." These words were intended to have the fullest effect, as was held in *Cullen v. Butler* (a), recently decided in *B. R.* The second count was framed on these general words, and the Court held the Plaintiff entitled to recover on that count. Effect is to be given, according to this case, to the general words in this policy, and according thereto any loss which happens is to be compensated. If it is a loss which comes not within any of the antecedent special losses, it does come within the general words.

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(a) Not yet reported.

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Vaughan, Serjt., *contra*. Barratry is well defined in a recent judgement of Lord *Ellenborough*, C. J., in *Earle v. Rowcroft* (a). A more correct report of the facts of *Vallejo v. Wheeler* is found in *Llofft* (b), printed from a note of *Alleyne* who argued it against *Buller*. The fact of his being owner, under the charter party, is expressly found by the jury, under the direction of the Court. It was thrice spoken to, and much argued on the point, whether *Willes* were owner, or *Darwin pro hac vice*, i. e. whether the ship was let, or whether the owner had only agreed to navigate her to a certain spot. Lord *Mansfield* says, "If she is let as a house, then he who hires her on freight is the owner." If a ship be let out generally to freight, then the freighter is owner for that voyage; but (which is material) if there be only a covenant to carry goods, the owner would have the direction of the ship, and the hiring of the master and mariners. Most charter-parties state, that the owner has let to freight, and the freighter hath hired. Here the parties have studiously avoided any thing like a letting: not a single expression of this charter-party shows that the ship was ever let, but there is much to show that the ship could not be let. Here *Fontes*, the owner, is also commander; and he covenants to take on board his vessel seventy tons of flax and five of hemp; and to go to *Figueira*; and when they get there, the captain may take on board what goods he pleases, and the freighter has nothing to do with it. If goods had been shipped at *Figueira* and lost, the Plaintiff would not have been liable for them: he had no interest or concern with the vessels. Whatever the captain took on board, was for the benefit of the owner of the ship, and on his account, not for the freighter's. The ship is not let for a gross sum: there is a stipulation, that if the freighter wanted at *Pernau* to ship more than 100 tons, the freighter should have the preference. What? give a preference to the man who was already owner of the entirety *pro hac vice*, and had the controul of the whole? This would be redundant. In *Vallejo v. Wheeler*, it was assumed, that the entire ship was let to freight. The owner comes on board, because he had a right to go on board, and had his own master and servants on board, and he runs her wilfully on shore. All the cases were submitted to the Court, in *Yates v. Railton*, wherein the Court was disposed to review *Hutton v. Bragg* (c). In the case of *Frazer v. Marsh* (d), wherein a ship was chartered to the captain for a certain number of voyages at a certain rent, Lord *Ellenborough*,

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(a) 8 East, 126.

(b) 631.

(c) *Ante*, VII. 14.

(d) 13 East, 238.

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C. J., says, "To say that the registered owner, who divests himself, by the charter-party, of all controul and possession of the ship for the time being, in favour of another who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain, during the time, would be pushing the effect of those acts much too far." No facts in this case show, that *Fontes* is deprived of the controul of his vessel. Here are wholly wanting those words which are the ordinary form of a charter-party, the "granting and letting to freight." Upon the defendant's own statement, there is in that an interval voyage, during which they agree that the government of the ship remains in the ship-owner; viz. from *Figueira* to *Pernau*; and it occurs to the freighter, that if the master takes in goods at *Figueira* and goes to *Pernau*, perhaps he may occupy a very inconvenient time, therefore he makes the owner covenant to get to *Pernau* by a certain time.

Best, in reply. The doctrine of *Vallejo v. Wheeler* ought to be extended rather than narrowed; whereas the Defendant's doctrine would without reason protect a person against his own engagement. It would be material to know, by the report in *Llofft*, what was the form of the charter-party in that case. There are as many forms of charter-parties as there are notaries. If a charter-party speaks of a full and complete cargo, it conveys the whole ship. In *Hutton v. Bragg*, though it does not appear by the report in *Marshal*, the charter-party was in the same words as in *Yates v. Railston*. There is in this present case a covenant to pay for the *freight or hire* of the ship for the voyage from *London* to *Figueira*, and from *Pernau* to *Oporto*; but these transactions ought to be construed liberally, and not upon a literal and narrow construction of the words of the charter-party: it must be construed by the general intent; and the intent here is, that the freighter shall have the entire ship for the voyage, not indeed with the power of hiring and displacing the master and mariners, for no freighter of a vessel ever had that power. From *London* to *Figueira* the owner could only carry goods for the freighter; there is a hiring of the ship to *Figueira*, and of the whole ship to *Figueira*; and although from *Figueira* to *Pernau* the master might take in what goods he pleased, without the freighter's controul, and from *Pernau* home the plaintiff was to pay according to the quantity of goods brought home, and if he did not fill her, the owner had a right to do it; yet the case finds that the 634 bales of flax put on board at *Pernau* for the

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Plaintiff then filled her; so that at the time of the barratry, and when the loss took place, the freighters having filled her, were as fully and completely owners, and in possession of the ship as a charterer can ever be. It matters not in what relation to the ship the Plaintiffs stood at another period, when the loss did not happen. It is said, they had only a right to carry goods, but if an owner grants a right to carry as many goods as a vessel will hold, he grants the use of a vessel. This is strongly illustrated by analogy to the case of *Burt v. Moore*. If one grants the grass of a field, the grantee is the owner for the time being, as was held in *Burt v. Moore (a)*; and may maintain trespass against the owner. Suppose the grantor had reserved a right to turn in one horse, that would be the reservation of a liberty, but the close is still in the grantee. But it is said, "How came the owner on board?" The answer is, "He came on board *ex maleficio*," and no paper or deed will prevent that. He went there to supersede the person to whom the conduct of the ship was entrusted. An exception of reasonable room for those who are to navigate the ship does not prevent the ship being in the freighter's exclusive possession: so lately held in *B. R.* in the case of the *Trinity House v. Clarke (b)*. All the useful part of the ship was here occupied by the goods of the Plaintiff. He who has the entire use of the ship, must be considered as the temporary owner of the ship. In *Nutt v. Bourdieu*, there was nothing to restrain the owner of the ship from doing what he would with it.

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Cur. adv. vult.

GIBBS, C. J., on this day delivered the judgement of the Court.

This was an action on a policy of insurance on the Portuguese ship *Jozé and Maria*, and the declaration avers a loss by barratry. I confine myself to the loss by barratry, because it is extremely difficult for the Plaintiff to recover on any other ground, if he cannot recover on that. The cause was tried before *Burrough, J.*, in *London*. Evidence was given of a charter-party of affreightment between *Fontes* of the one part, and *Soares*, therein expressed to be the *freighter* of the said brig, of the other part, which witnessed that for the considerations therein mentioned *Fontes* covenanted that the said brig being tight and staunch, as is usual for vessels in merchants' service, and for that voyage, should receive and take in seventy tons of flax, and five tons of hemp, sail for the port of *Figueira*, give notice of arrival, and make

(a) 5 Term Rep. 329.

(b) 4 Maule & Selw. 288.

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true delivery, and with all despatch sail for *Pernau* in *Russia*, where, being arrived, she should immediately give notice to the freighter, and take on board one hundred tons of flax, with other goods, and sail for *Oporto*, and on arrival give notice, make delivery according to bills of lading, and such delivery being completed, end the said intended voyage. So that by this stipulation, the master covenants, as in the last case, with the freighter, to take certain goods on board, to go to *Figueira*, thence to *Pernau*, to take in there one hundred tons of flax, proceed with the cargo to *Oporto*, make true delivery there, and so end the voyage. There are stipulations for the freight which it is not, I think, necessary to state, but there is a provision that the commander shall have liberty, without prejudice to this charter-party, to take in goods at *Figueira* and convey the same to *Pernau*, which is not an uncommon provision. There is another provision, and the freighter agrees (for this, it is observable, the commander has the leave of the freighter), that it shall be lawful for the commander to complete a cargo at *Pernau*, with other goods to be put on board over and above the said one hundred tons of flax: in other words, if I put one hundred tons only on board your vessel, the commander may fill up the vessel with other goods; but if I, the freighter, choose to fill her up, I am to be at liberty so to do. The case states that the freighter put on board seventy tons of flax, and five tons of hemp, that the ship sailed and arrived at *Figueira*, discharged her cargo, and sailed in ballast to *Pernau*, so that it appears that the commander put no goods on board at *Figueira*. The ship took in at *Pernau* six hundred and thirty four bales of flax, which filled her up, so that the commander had no means of putting any goods on board. While she was lying at *Deal*, full of the Plaintiffs' goods, and no room for any others, the owner of the ship came on board, took the command of her, and *Gouwea*, the captain, assenting, wilfully ran her ashore, and the goods were lost to the Plaintiffs. The material question is, whether this is a loss by barratry, and the objection to the Plaintiffs' recovery is, that it was the owner of the vessel who ran her ashore, and by his act occasioned that; which is supposed to be a loss by barratry. Barratry is an act of fraud not directed against the owner of the goods which are lost, but a fraud against the owner of the ship; and, however innocent may be the owner of the goods, who seeks to recover against the underwriter, yet, if the owner of the ship concurs in the act which caused the loss, it takes from it the character

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character of barratry; for the very definition of barratry, is a fraud by the master and mariners against the owner of the ship. Pursuing this principle, in *Vallejo v. Wheeler*, an action which was brought to recover for a loss by barratry, wherein it was objected, that as the owner did concur, it could not be barratry, the answer given was, the freighter is, for the time, *pro hac vice* the owner. You who have let the ship to freight, are for the time not the owner. If *Darwin* had in that case concurred, it would have been no barratry, but you, *Willes*, having parted with the possession of the ship for a time, are not the owner, and your concurrence does not prevent its being barratry. That was the principle of *Vallejo v. Wheeler*, and it has ever since been recognized as law. In all the other cases which have been decided pursuant to that, the owner of the ship has retained no controul over any part of the ship (the words "let to freight" I pay no regard to). Here the commander covenants to receive on board goods in *London*, and to proceed to *Figueira*, there being no stipulation that any goods should be put on board at *Figueira*, because the ship-owner thought himself sufficiently recompensed by the freight stipulated for the rest of the voyage; the freighter stipulates that it shall be lawful for the owner to put goods on board at *Figueira*, and take them to *Pernau*. This is much like a stipulation by the ship-owner, that he considered the ship let to the freighter, and that without this provision in his favour he would have had no right to put on board any goods of his own, and that he must otherwise be content with the freight of such goods as the freighter should put on board. The same observation applies to the stipulation that the owner might ship goods from *Pernau*, over and above the one hundred tons, if the freighter did not choose to fill up the vessel. But it is urged that the owner having a right to ship goods on freight on his own account, never divested himself of the government of the ship, and therefore his acts cannot amount to barratry. It is, however, a question, whether the parties have not changed places, and whether the freighter is not to be considered as the owner, and whether the owner has not merely reserved to himself the power to do certain things, notwithstanding the charter-party, and without prejudice to it. That is a fair question to make, but we are to look to a further state of the circumstances: if the original owner, though he continued owner for some part of the voyage, had ceased to be the owner when the act took place, then this act of his has ceased to have any effect whatsoever. At *Pernau*

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the freighter exercised his election to put on board as much merchandise as entirely occupied the ship, and the original owner was thereby precluded from the opportunity of loading any goods on board. However, therefore, the question might have stood, if the act had happened during the period in which it might be doubtful who had the controul of the ship, or in which it was divided between them, here the period when the owner might have resumed a right in the ship was passed. The freighter had filled her up at *Pernau*, and the owner's opportunity was passed; and the freighter had a right to require that she should then proceed, without any controul of any other person, except himself, to her place of destination. Then the act of the original owner and master together, was a complete act of barratry. If the right of the original owner was then at an end, the right of the freighter must be in existence. The concurrence of the freighter was then the only thing that would prevent the act of the master from being an act of barratry. The freighter did not concur in this act, this therefore falls within the principle of *Vallejo v. Wheeler*; and thought there are some minute circumstances of distinction in this case, we are of opinion that they do not take it out of that principle, and that the judgement therefore must be for the Plaintiff. We cannot regret the result to which this reasoning has conducted us; for it is a very hard thing, when a person has insured his goods, to find himself exposed to a loss, to which he supposed his indemnity would extend, but in which he is frustrated.

Judgement for the Plaintiff.

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POPE v. TILLMAN.

A declaration in replevin for taking divers goods and chattels of the Plaintiff, is bad for uncertainty.

And although judgement pass by default for the Plaintiff, the defect is not cured by the statute of jeofails, 4 Ann., c. 16.

IN replevin, the Plaintiff declared, that the Defendant, in a "certain dwelling-house, took divers goods and chattels of the Plaintiff." After judgement by default, for the Plaintiff, and a writ of inquiry executed, *Lens*, Serjt., in the last term, obtained a rule *nisi* to arrest the final judgement; against which, *Best*, Serjt., now showed cause. Neither in the case of *Wiatt v. Essington* (a), nor in that of *Bertie v. Pickering* (b), which were cited in moving for the rule, was the attention of the Court

(a) 2 *Ld. Raym.* 1410.

(b) 4 *Burr.* 2455.

referred

referred to the statute of *Ann* (a). Those cases too are in trespass, wherein it is more necessary to enumerate the goods than in replevin. The objection is now cured by that statute of jeofails (b), since the passing whereof it is only necessary to consider whether this is matter of substance or of form. The taking of the Plaintiff's goods is the substance, the enumeration of them is merely matter of form. *Bowdell v. Parsons* (c), the omission of the venue of a request is matter of form, and cannot be taken advantage of by motion in arrest of judgement, which is bound by the same rules which regulate general demurrers.

Lens, in support of his rule, was stopped by the Court,

GIBBS, C. J. In case there should be a judgement *pro retor-no habendo*, or *capias in withernam*, it is extremely material, that the declaration in replevin should inform the sheriff what are the goods taken. I would not give judgement in this case, without stating, that the Court have not failed to advert to a case in the time of Lord *Hardwicke* (d), in which it was held that a count for taking *quandam parcellam lintei, et quandam parcellam papyri*, was good; and another case (e), in which the taking fourteen skimmers and ladles, was held sufficient; but there was something to guide the party: here is nothing whatever to guide the party as to the nature of the goods taken; and it is still more necessary in replevin, than in trespass, and much more so than in trover, that the goods should appear. Upon this declaration, we therefore think, no judgement can be given.

Rule absolute to arrest the judgement.

(a) 4 *Ann. c.* 16. ss. 1 & 2.

(b) 4 *Ann. c.* 16.

(c) 10 *East*, 359.

(d) *Cas. temp. Hardw.* 124., and *Kempston v. Nelson*, S. C. 6 *Buc. Abr.*, *Replevin*, H.

(e) 2 *Str.* 1015. *Bourne v. Mattaire*.

CRAVEN v. CRAVEN.

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IN this case, two actions pending between the parties (who were brothers), and all other matters in difference, were referred to an arbitrator, who, on the first hearing, apprized the Plaintiff, that he had no cause of action; whereon he prayed to be let into an equitable case, which he supposed he had, and attended the arbitrator by an equity counsel, with whose law the

The Court will not review an award, on a suggestion that the arbitrator to whom all matters in difference were referred, considered only the

legal, and rejected the equitable questions, when the party applying does not state to the Court any equitable case, or question which he supposes the arbitrator to have rejected.

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arbitrator perfectly agreed; but deeming it wholly irrelevant to the circumstances of the parties, although on account of the near connexion between them he had submitted to hear the story four times told over, and leaving no question undisposed of, he made his award in favour of the Defendant.

Pell, Serjt. had, on a former day, obtained a rule *nisi* to set aside this award, upon an affidavit, which suggested, that the arbitrator had refused to enter into the equitable case of the Plaintiff; and although it was a reference of all matters in difference, had confined himself to the mere matter of the two actions; (but this ground was completely disaffirmed by the arbitrator's affidavit, stating to the effect above detailed;) next, that inasmuch as the arbitrator had made his award respecting the two actions only, and not respecting the other matters in difference, which it appeared existed, the award was not final.

Lens, Serjt., in showing cause, insisted, that inasmuch as the plaintiff did not even now state any equitable ground, or any evidence which he had before offered, on which the arbitrator ought to have decided differently, the Court would not intend that the arbitrator had done wrong.

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GIBBS, C. J. The questions in this case are, first, whether the award be final; secondly, whether the arbitrator has so conducted himself as to give ground to either party to set aside his award. First, this is a reference of all matters in difference, and the award therefore ought to go to all matters in difference; and the arbitrator so recites in his award, and then he says, "Having considered all the evidence and papers, *touching the matters in difference*, I award, that the Plaintiff has no cause of action;" this, therefore, purporting to be an award concerning the matters in difference, is equivalent to an award on the premises, which, according to my recollection, must be taken to be final, as to all matters referred. Next, whether the arbitrator's conduct requires the award to be reviewed. I agree with the Defendant's counsel, that it is not sufficient to put an abstract proposition to an arbitrator, and upon his answer, decline to give evidence, or prefer a claim, and then complain of it, but that he should tender a specific case and specific evidence: but I think, on the fair construction of this affidavit of the arbitrator, he has completely answered this charge. It is said, that he refused to entertain an equitable question: he was, however, attended by an equity counsel, and he agreed with him in all his propositions of law, but was not prepared to think them applicable to the present subject; and

and he swears that he was determined, on account of the situation of the parties, to reject nothing which could tend to elucidate the question between them.

Rule discharged.

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WOOD and Another v. DAY.

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THIS was an action of covenant. The Plaintiffs averred that *Thomas Knackstone* the elder, being seised in fee of the premises, which they averred to be gavelkind lands in *Kent*, in 1725 died intestate, leaving *Frances* his widow, and *Thomas* and *Francis*, his sons, to which sons, as his co-heirs by the custom of gavelkind, one undivided moiety descended, and they became thereof seised in fee, in undivided moieties, and *Frances* the widow became seised of the other undivided moiety for life, as her dower, the reversion after her death or second marriage belonging to the sons *Thomas* and *Francis* in fee, in equal moieties, in common; that in 1754 *Francis* the son died intestate, seised of the moiety of a moiety in possession, and of a moiety of a moiety in reversion expectant on the decease or marriage of *Frances* the widow, leaving an only daughter, *Frances*, to whom the same descended in fee; that *Frances* the widow, in 1754 married *Frederick Hill*, whereby, according to the custom of gavelkind, the moiety which was vested in her, as her dower, became forfeited, and vested in *Thomas*, the son, and *Frances* the daughter of *Francis*, in equal moieties, and they respectively became seised thereof in fee, but they permitted *Frederick Hill* and *Frances* his wife to remain in possession of that moiety until the death of *Frances Hill*; that in her lifetime, by indenture, dated 18th March, 1754, between *Frederick Hill* and *Frances* his wife, *Thomas* the son, and *Frances* daughter of *Francis* the son, of the first *part, and *Hans Sloane*, of the other part, *Frederick Hill* and *Frances* his wife, *Thomas* the son, and *Frances Knackstone*, demised to *Sloane*, his executors administrators, and assigns, the premises, with the messuage then standing thereon, for the term of sixty-one years at a certain rent: and *Sloane*, for himself and his assigns, covenanted with *Frederick Hill* and wife, their executors and assigns, and with *Thomas* and *Frances Knackstone*, their heirs and assigns severally, that he and his assigns would, before the end of two years of the term, at his and their own costs, take down the messuage then standing on the demised ground, and in the room

A covenant to rebuild a house in two years, and sufficiently to repair the same and all other buildings to be erected during the term, when, where, and as occasion should require, and the same in all things sufficiently repaired, in the end of the term to yield up to the lessor, was followed by a covenant that the lessor might, twice or oftener in a year, enter to view the condition of the premises, and of all want of reparations leave notice in writing to repair within six months, within which time the lessee covenanted to repair accordingly: Held that the first covenant is not so qualified by the last, but that the Plaintiff may declare on the leaving the premises out of repair at the end of the term without averring or proving six months notice to repair.

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thereof erect a good and substantial brick and timber messuage, and would, at his and their like costs, sufficiently repair, &c. the messuage so to be erected, and all other buildings which should be erected upon the ground, and all fences, &c., to the premises then belonging, or that should thereafter, during the sixty-one years' term, be erected on the premises, when, where and as occasion should require; and the said messuage, and all other erections so to be, and which should be erected on the demised ground, so being in and by all things sufficiently repaired, &c., in the end of the demised term, or other sooner determination or becoming void of the lease (which should first happen), would yield up to *Frederick Hill* and wife, or their assigns, if the wife should be then living, but if dead, then to *Thomas and Frances Knackstone*, their heirs and assigns. They then averred *Sloane's* entry, the reversion of the respective moieties belonging to *Thomas* and to *Frances Knackstone* in fee, and averred, that though *Frederick Hill* and wife were parties to the lease, they had not, nor had either of them any legal title in the premises, the title of the wife having been, by the custom of gavelkind, forfeited by her marriage; and they aver the death of *Frances* the widow in 1761; and they deduced the title of the reversion to the Plaintiffs by subsequent mesne assurances, and averred an assignment of the term to the Defendant, and assigned for breach, that in that state of the title, and during the term, a messuage and stables and divers buildings which had been erected on the demised ground pursuant to the covenant in the lease contained, or which was thereon at the time of making the indenture, and were contained on the premises after the respective assignments of the reversion and term, and pending the term, were ruinous and dilapidated in the roofs, &c., and fences, &c.; and that the Defendant left them so in decay at the end of the term, contrary to the effect of *Sloane's* covenant. The Defendants pleaded, first, *non est factum*; secondly, that *Frederick Hill* and *Frances* his wife had a legal interest in the premises, and after traversing divers facts of the title in eleven other pleas, they pleaded, fourteenthly, that the premises in the declaration mentioned did not become ruinous, &c., and that the Defendant did not at the end of the term, leave the messuage, &c., in a ruinous and dilapidated state. The cause was tried at the *Maidstone Lent* assizes, 1817, before *Dallas, J.* The lease to *Sloane* was put in evidence, whereby the rent being reserved as to the one moiety to *Frederick Hill* and wife, it was objected

objected for the Defendants that this was *primâ facie* evidence of an interest in them, and that no evidence being adduced to the contrary, the second issue, that they had an interest, must be found for the Defendants. Secondly, it was objected, that if, as the declaration averred, *Hill* and wife had no legal interest, then it was erroneously averred that they demised; for that the demise must in that case be, in law, the demise of *Thomas* and *Frances Knackstone* only, and that so there was a variance between the proof and the declaration. The lease also contained a covenant that "it should be lawful for *Hill* and wife during her estate and interest in the premises, and also for *Thomas* and *Frances Knackstone*, their heirs and assigns, twice or oftener in every year, to enter and come into the demised premises to view the state and condition thereof, and of all defects and wants of reparations found, to give or leave on the premises notice in writing to *Sloane* or his assigns, to repair within six months, within which time *Sloane* covenanted severally with *Hill* and wife, and with *Thomas* and *Frances Knackstone*, to repair accordingly." And hereupon it was, thirdly, objected, that there was no covenant to repair generally, but only after six months' notice, and that no notice being proved, this action could not be maintained. *Dallas, J.*, reserved these points, subject whereto the jury found a verdict for the Plaintiff.

Copley, Serjt., had, in *Easter* term, accordingly obtained a rule *nisi* to set aside the verdict and enter a nonsuit on the first and third objections, and to arrest the judgement on the second: against which

Onslow and *Blosset*, Serjts., now showed cause. The first and second objections are in substance the same, and they are answered on the record (all parts whereof the plaintiff may call in aid); for the law of gavelkind is the law of the land, and it is clear, that a widow forfeits her gavelkind estate in dower by marriage; therefore, on the averment that *Frances Knackstone*, the widow, married *Hill*, it appears that her estate had ceased, and it is shown on the record who are the heirs; but further, it is shown that she is dead, and that her estate was a life estate; so there is no need to deduce title from her. The objection is thus put, that if *Frederick Hill* and wife had no title to the premises, then it is the demise of two only, and the Plaintiff states it as the demise of four; but the Plaintiffs are bound to state the lease as it is, otherwise they would fail on the issue of *non est factum*. If it be not stated according to its legal effect, that is only a ground

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ground for the motion in arrest of judgement. The plaintiffs aver that Mrs. *Hill's* moiety was gavelkind land: they aver, and it is not denied, that her estate was only for her life, during her widowhood: they aver that she, having no interest joined, that she married, and that her estate vested in her children in fee. The Defendant, admitting all this, singles out that part of the recital which states, that Mrs. *Hill* has no interest, and alleges that she had an interest. This then is an affirmative proposition which the Defendant is bound to prove. The only interest alledged in Mrs. *Hill* on the record, is an interest for life; the Plaintiff shows the determination of that interest before the conveyance of the reversion. Suppose her estate for life had been absolute; if the Plaintiffs show that she died before the grant to them of this reversion, it is immaterial to them, whether she had an estate for life or not. If she had an estate for life, she had a present interest, and a demising power at the time of the demise, which gets rid of the objection that it was not her demise, but her confirmation. If she had no present interest, still it cannot be taken advantage of here, for it is not the point of the action, but inducement to the action, and so differs from *Treport's* case, which was *ejectione firmæ*, and plea not guilty, which put in issue every material allegation of the declaration, and, amongst others, that on which his title rested, that he had a lease from two. Here, what is averred on the record is proved, that Mrs. *Hill* had an estate for life, that by her marriage her life estate fell into the other two; so that the estate was unquestionably out of the way, either by her marriage, or by her decease, at the time of making the lease of the reversion. *Challoner v. Davis* (a). As to the motion in arrest of judgement, *Treport's* case (b), cited in moving for the rule, is this: In ejectment, a Plaintiff declared on a lease by *A.* and *B.* a special verdict found that *A.* was tenant for life, with remainder to *B.*, in fee. It is the demise of *A.* and the confirmation of *B.*, during the life of *A.*; and after *A.'s* death, it is the lease of *B.* and confirmation of *A.*; and because the Plaintiff declared on the joint demise of *A.* and *B.*, it was found against the Plaintiff. That is not analogous to the present case, where the Plaintiffs have stated it as the lease of four, and that two had no interest. The Plaintiffs derive no title under this lease, it is the lease under which the defendant holds, and which he has broken, and which, he has pleaded, is a good, valid, and subsisting lease. In *Hauzwood* and

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(a) 1 *Ld. Raym.* 403, 4. cites *Latch.* 95. and *Hob.* 107.(b) 6 *Rep.* 15.*Husband's*

Husband's case (c), action for disturbing him of his common, the Plaintiff derives title by lease from *A.* and *B.* *A.* was tenant for life, and *B.* remainder man in tail, and reversion in fee; and the same objection was made as in *Treport's case*, and it was held, the variance was not material, for it was only conveyance to the action. In *Hauxwood v. Husband*, it did not appear on the declaration, as it does here, that one was tenant for life, and the other reversioner, and although possession is sufficient in the one case, and not in the other, and the Plaintiff, in an action on the case, need not state his title, nor the technical steps by which he makes it out; yet the proof in the one case, and the statement on the record in the other, must equally coincide with the law. As the case stands, the objection can only be taken advantage of on the plea of *non est factum*. As to the third objection, if a covenant be to repair on six months' notice, in order to succeed in an action on that covenant, notice must be proved, but here is another covenant for which no notice is necessary, namely, a covenant to leave in repair at the end of the term, and the Plaintiffs declare for not leaving in repair. This is distinct from the covenant which gives the lessor leave to enter on the premises, and give notice. It cannot be intended that the Plaintiffs are to give him at the end of the lease six months' notice to enter and repair the premises six months after the time when he would become a trespasser. And though the Plaintiffs could not, without proving a notice, recover on the covenant to which it relates, they are entitled to recover on this. The lessee has no longer any *locus penitentia*, or power to repair. If the covenant for notice controlled the other covenant, it would follow that during the last six months, and ever after, no action could be maintained for the want of repairs; for six months' notice could not be given him, because the lessee cannot re-enter and do the repairs after his term. The covenant permitting the lessor to inspect and give notice, is introduced, not for the benefit of the lessee, but of the lessor.

Copley in support of the rule. As to the first point, the want of interest in *Frederick Hill* and *Frances* his wife, it is stated on the record, that they had no interest whatever, and it was necessary that it should be so averred, for it was necessary that the apparent interest should be shown and got rid of. The Plaintiffs aver in the second plea, that there was an interest in *Frederick Hill* and *Frances* his wife, but that is a mere denial and tra-

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(c) 1 Leon. 177. S. C. by name of *Honeywood v. Husband*, Cro. El. 153, 4.

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verse of the allegation in the declaration, that there was no such interest, not a substantive averment that there was such an interest; else the Plaintiffs must have proved it. The life interest which *Frances Hill* is shown to have had, is also shown to be gone. She then had no interest, but she joins in the demise; the bare production of that demise, is evidence that she had an interest, and disproves the allegation on the record, that she had no interest. Next, the Plaintiffs are entitled to arrest the judgment: it is laid down in all the authorities, that a title on record must be set out according to the substance and legal effect of the deed. Here it is stated on the record, that there is no interest in *Frederick Hill* and wife. The deed produced was a demise by *Hill* and wife as well as the others; and, unless it were shown that those two had no interest, this deed proved that he had an interest. If it be true that there was no interest in two of the parties, it ought to be stated as the demise of the other two. The Defendant would not have objected, as is supposed, that there was a variance, if the Plaintiffs had proved that two had no interest; for if, in point of law, this were the demise of two only, though on the face of the deed, a demise by four appears, it would be no variance. *Chester v. Willan (a)*. One of three joint-tenants granted, bargained, sold, assigned, and set over to another, all his estate. The jury found that he "granted"; that expression in a verdict was held sufficient, as the saying of laymen; but the Court held that it would not suffice in a plea. Here the Plaintiffs have put a number of facts on the record, whence they wish the Court to collect the inference, that this is the demise of two, though they state it to be the demise of four. The party pleading must take on himself to ascertain the legal effect of the deed. So in *Osmere v. Sheafe (b)*, a grant of a rent, in consideration of natural affection ought to be pleaded as a covenant to stand seised to uses, it must not be pleaded by way of argument and inference, but the Defendant, at his peril, must plead it according to its legal effect. So, in *Baker v. Lade (c)*, which also was a case in replevin, and so ruled on demurrer to the pleadings. So *Taylor v. Vale (d)*, *dedi et concessi*, if it operate as a bargain and sale, must be so pleaded. As to the third point, of the covenant to repair; the way in which the objection is put, is perfectly correct. The Defendant is not bound to adhere to his plea of *non est factum*, if he chooses to rely on the second plea to the covenant itself. If the Plaintiffs have set out a

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(a) 2 *Saund.* 96. (b) *Carth.* 307. (c) 3 *Lev.* 291. (d) *Cro. El.* 166.

covenant without setting out another part that qualifies it, the Defendant may take advantage of it on the plea of *non est factum*. If the Plaintiffs gave notice to repair one month before the end of the term, the Defendant would be bound to repair; the request to repair would include a license to enter and repair, and if the lessor refused to admit him, it might be pleaded. Here, as the Defendant contends, is a covenant to repair in this instance, qualified in this way: The lessor is to give notice to repair in the first instance, and then the lessee is to repair within six months. *Roe, dem. Goatley, v. Paine (a)*, they admitted, was to the contrary effect. If there is an interest apparent in any party on the record, it is necessary that the precise nature of that interest should appear, and the extinction of that interest. As to the argument that it appears that it was only a life estate, that is not so, for it is averred that the life estate was gone, therefore apparently, this was another interest, and might endure to this day; and so it is not shown that *Frances Hill* has not an interest now existing, nor that the Plaintiffs are the proper parties to bring this action: therefore the judgement must be for the Defendant.

Cur. adv. vult.

On this day GIBBS, C. J., delivered the judgement of the Court. First, it is objected, that on the Plea of *non est factum*, the instrument introduced does not appear to be such a deed as is stated by the Plaintiffs. The next objection is this; it is said that *Hill* and his wife had nothing in the premises, yet they are averred to demise; but we must look to another allegation in the title, which stands uncontradicted. The Plaintiffs state that *Thomas Knackstone* the elder was seised in fee of the premises, that on his death, by the custom of gavelkind, they descended, as to one moiety, to his wife, for her life, and as to the other, to his sons, *Thomas* and *Francis*; that the widow lost her moiety by her marriage; and that the estate thereby came to the *Knackstones*, who suffered her to remain in possession: they thus deduce a clear title in *Thomas* and *Francis Knackstone* to the whole; and I think they might have stopped there; but they aver, that *Hill* and wife had no title; this, I think, is only an averment that they acquired no other title. If it be understood in any other sense, the issue taken thereon appears to be an issue of law, and so is immaterial; but if taken as a denial of the allegation that no estate in the premises came by any other conveyance to the *Hills*, then it was incumbent on the Defendant to prove

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(a) 2 Campb. 521.

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that such estate did come; for, inasmuch as that is a negative averment, it could not be proved by the Plaintiff, but if at all to be proved, it was to be proved by the Defendant. We think, therefore, that the Plaintiffs have not failed in making out their case in proof, and therefore both the rules, as well that for a new trial, as the rule in arrest of judgement, must be

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The Plaintiff covenanted that his ship would receive from the freighter's agent at *Gibraltar*, or at *Malaga*, *Seville*, or *Cadiz*, as should be ordered by the freighter's agent at *Gibraltar*, a homeward cargo, and therewith sail direct to *London*, and there make true delivery of it; and the freighter covenanted to pay for the freight of the vessel for the voyage out and home 55*l.*, viz. 20*l.* on clearing outwards, 100*l.* at *Gibraltar*, one moiety of the residue in cash on the delivery of the homeward cargo in *London*, and the other moiety by a bill at two months from the completion of the said delivery. The Plaintiff, in

THIS was an action of covenant. The declaration stated that by indenture between the Plaintiff and the Defendant, the Plaintiff, who was master of the brig *Fortitude*, covenanted with the freighter and his assigns, that the vessel being then tight and properly fitted for the voyage, the master should immediately receive on board in *London*, from the freighter, such goods as he might think fit to load, and therewith proceed direct to *Gibraltar*, where being arrived, and ready to deliver the cargo, he the master would give immediate notice thereof to the freighter's agents, or assigns there, and make a true delivery of the cargo, agreeably to bills of lading; and having completed the delivery of the outward cargo, and being again ready to load, the master would receive on board from the agents or assigns of the freighter at *Gibraltar*, or at *Malaga*, *Cadiz*, or *Seville*, as should be ordered by the freighter's agents or assigns at *Gibraltar*, such other goods as they might think fit to load; and having received the homeward cargo on board, therewith should sail direct to *London*, where being arrived and ready to deliver the homeward cargo, he the master would give immediate notice thereof to the freighter, his agents, or assigns, and make a right and true delivery thereof, agreeably to bills of lading, and, such delivery being completed, end the intended voyage; the act of God, the king's enemies, restraint of princes, rulers, *fire, and all dangers and accidents of the seas, rivers, and navigation, excepted; and the master thereby agreed that the vessel should lie in the port of *London* for receiving the outward cargo, and at *Gibraltar* for delivering the same, and there, or at *Malaga*, *Cadiz*, or *Seville*, for receiving the homeward cargo, and in *London* for delivering

pursuance of directions from the freighter's agent at *Gibraltar*, sailed to *Cadiz* for a cargo, the freighter's agent at *Cadiz* directed him to go to *Seville* for a cargo; the freighter's agent at *Seville* loaded a homeward cargo, and directed him to proceed to *Liverpool*, where he delivered, and the freighter received the cargo. Held that the Plaintiff could not, in an action of covenant on the charter-party, averring the substituted voyage, recover the freight covenanted to be paid on the delivery in *London*.

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the same, sixty running days in the whole, to commence from the day on which the vessel should be entered outward at the Custom House in the port of *London*, and ready to receive the said outward cargo, to cease on her being despatched therewith, recommence on her arrival at *Gibraltar* aforesaid, being admitted to *pratique*, ready to deliver, and notice thereof being given as aforesaid; to cease in the event of her being despatched from thence to another port, and recommence on her arrival at such other port, and being ready to load; to cease again on her being despatched with the homeward cargo, and finally recommence on her arrival and being reported inward at the custom-house in the port of *London*; in consideration whereof, the freighter thereby covenanted with the master, that he, the freighter, his agents, or assigns, would at his or their costs send the outward cargo alongside the vessel in the port of *London*, and receive the same from alongside her at *Gibraltar*, also give the orders relative to the vessel's port for loading the homeward cargo, and, at *Gibraltar*, or at *Malaga*, *Cadiz*, or *Seville*, at his or their own costs, send alongside the vessel the homeward cargo, and receive the same from alongside her in *London*, within the days thereinbefore limited for those purposes, or days of demurrage thereinafter granted; and also would pay to the master or his assigns, for the freight of the vessel for the voyage both out and home, 550*l.*, with 5 *per cent.* primage thereon; and a gratuity to the master of 26*l.* 5*s.*; and that the freight primage and gratuity should be paid as follows, viz.: 200*l.* in cash forthwith on the day the said vessel should be cleared outward at the custom-house of *London*; 100*l.* in cash forthwith on delivery of the outward cargo at *Gibraltar*, at the then current rate of exchange; one equal moiety or half part of the remainder in cash forthwith on delivery of the homeward cargo in *London*, and the residue thereof to be paid by a bill or bills to be drawn upon, and accepted by the firm of *McCarthy and Brown*, payable in *London* at two months from the completion of the said delivery; moreover, the master thereby agreed that the freighter, his agents, or assigns, might keep the vessel on demurrage at her ports or places of loading and unloading 10 running days in the whole, over and above the lay days, on paying 5*l.* 5*s.* sterling per day; and the Plaintiff averred that the vessel at the time of making the charter-party was tight and properly fitted for the voyage, that the master immediately received on board in *London* from the freighter, such goods as he thought fit to load, and therewith sailed to *Gibraltar*,
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and arrived there with the outward cargo, and gave immediate notice thereof in writing to the agents or assigns of the freighter there, and made true delivery of the cargo agreeably to bills of lading which were signed for the same; and afterwards completed the delivery of the outward cargo; and the vessel being again ready to load, the master being then and there willing and ready to receive on board her from the agent or assigns of the freighter at *Gibraltar*, or at *Malaga*, *Cadiz*, or *Seville*, as should be ordered by the said agents or assigns at *Gibraltar*, such other goods as the said agent or assigns might think fit to load, he the master was afterwards, at *Gibraltar* aforesaid, ordered and directed by the agents of the freighter at *Gibraltar*, to wit, one *Alexander Farquharson*, the agent of the freighter at *Gibraltar* in that behalf duly authorized and empowered, to proceed from *Gibraltar* to *Cadiz*, for the purpose of there receiving on board an homeward cargo; and afterwards, in consequence of and in obedience to such orders and directions, set sail in and with the vessel from *Gibraltar* for *Cadiz*, and, arrived there, gave notice of such his arrival at *Cadiz* to the agents of the freighter, and was willing to have received on board the vessel from the agents or assigns of the freighter at *Cadiz*, such other goods as the last-mentioned agents or assigns might think fit to load, whereof the freighter's agents or assigns at *Cadiz* had notice; and he further averred, that he remained at *Cadiz* in such readiness for a long time; that the freighter's agents or assigns at *Cadiz* did not think fit to put on board the ship at *Cadiz* any goods, but after his arrival with the vessel at *Cadiz*, and after he had continued there with her in readiness as aforesaid, he was ordered and directed by the freighter's agents at *Cadiz*, to wit, the firm of *Strange and Co.*, the freighter's agents at *Cadiz* in that behalf duly authorized and empowered, to proceed with the vessel without delay to *Seville*, and there to receive from the agents of the charterer a full cargo of lawful goods as might be tendered him by the last-mentioned agents, and to do with the same in the manner provided for by the charterer, with the exception that the port of delivery of the last-mentioned cargo should be *Liverpool* and not *London*; and the Plaintiff averred that in pursuance of the orders so received by him from the freighter's agents at *Cadiz*, he afterwards, and with all due speed, sailed with the vessel from *Cadiz* for *Seville*, arrived, and gave immediate notice thereof to the freighter's agents or assigns there, and there received on board the vessel from the freighter's agents or assigns at *Seville*, such goods

goods as the freighter's last-mentioned agents or assigns thought fit to load, and *were tendered to him; and the vessel having received that homeward cargo on board, immediately sailed from *Seville*, and returned therewith direct to *Liverpool*, being the port appointed and substituted for the port of *London* as the port of delivery of and for the homeward cargo, arrived with the homeward cargo at *Liverpool*, and was ready to deliver it, gave immediate notice of his arrival at *Liverpool*, and of his readiness to deliver the homeward cargo, to the freighter's agents or assigns at *Liverpool*, and made a true delivery thereof at *Liverpool* agreeably to the bills of lading which were signed for the same; and the homeward cargo was there, at *Liverpool*, received by the freighter's agents or assigns: that such delivery of the homeward cargo was completed at *Liverpool*, and so the voyage was ended, according to the form and effect of the charter-party; whereof the Defendant had notice; and the Plaintiff further averred that he would have made a true delivery of the homeward cargo in the port of *London*, if he had not so been ordered and directed by the freighter's agents or assigns at *Cadiz* to proceed therewith to *Liverpool*, and if *Liverpool* had not been substituted by the freighter's agents or assigns as the port of delivery of the last-mentioned cargo instead of *London*; and although the Plaintiff had truly performed the charter-party in all things therein contained on his behalf, yet, protesting that the Defendant had not performed any thing in the charter-party contained in his behalf, he averred a breach in the nonpayment of the sum of 550*l.* for the freight of the vessel for the said voyage both out and home, with primage and gratuity to the master, contrary to the form and effect of the charter-party, and the covenant of the Defendant in that behalf therein contained. He also averred a breach for 16 days' demurrage at *Seville* and *Liverpool*, which was so as aforesaid appointed and substituted as the port of delivery of the homeward cargo, for and instead of *London*. The Defendant, after craving *oyer*, demurred generally to this declaration.

Best, Serjt., on a former day in this term contended, in support of this demurrer, that, inasmuch as the charter-party gave no discretion to the freighter's agents at *Gibraltar*, *Cadiz*, or *Seville*, to substitute *Liverpool* for *London* as the port of delivery, but was confined to the directions, whether the ship should receive her homeward cargo at *Gibraltar*, or at *Malaga*, *Cadiz*, or *Seville*, the voyage to *Liverpool* and delivery of the cargo there was no performance of any covenant contained in this charter-party;

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party; and however the Plaintiff might be entitled to a remedy in some other form of action, an action of covenant on this instrument could not be maintained, to recover a compensation for this service. It is not shown on the declaration that the substituted voyage is brought within the scope of the duties which the master by that charter-party takes on himself. The one voyage could not be substituted for the other by parol, so as to engraft it upon the same contract. It is a maxim *unumquodque dissolvi eodem ligamine quo ligatur*. It would, perhaps, be contended, that even if the Defendant could before breach dispense with the Plaintiff's performance of his original contract to take the homeward-bound cargo to *London*, yet that he could not thereby discharge himself from his own obligation to pay the freight covenanted; but in that case the Plaintiff, in order to entitle himself to recover, must, on the covenant, show either that he has performed the voyage covenanted, or, at least, that he has done all which was in his power to do, and was prevented from doing the residue by the act of the covenantee: if the Plaintiff had here shown that he did all in his power to deliver the cargo in *London*, and was prevented therefrom by the act of the Defendant, he might have properly averred a breach of the Defendant's covenant to employ the vessel in bringing a cargo to *London*, and to pay freight for the same; but he does not declare on that engagement, but on a supposed substituted contract to carry to *Liverpool*, for which no covenant exists, either in the charter-party, by relation to future orders therein contemplated to be afterwards given, or in any subsequent instrument: if, indeed, any such subsequent deed were in existence, it would be incumbent on the Plaintiff to declare thereon, whereto the first charter-party would then become mere inducement. If the Plaintiff, after delivering his cargo at *Liverpool*, had proceeded to *London*, and declared for the freight to *London*, averring a dispensation by the Defendant of carrying it further than *Liverpool*, that action might possibly have been sustained, but this declaration, which founds itself on the performance of a wholly new bargain, not made under seal, and infers from it the conclusion of law which would have resulted from the performance of the voyage covenanted, is misconceived. In *Worsley v. Wood (a)* Lord *Kenyon*, C. J., lays down the doctrine much more strongly than is necessary for this case. "If there be a condition precedent, to do an impossible thing, the obligation becomes single; but, however improbable the thing

(a) 1 T. R. 719.

may be, it must be complied with, or the right which was to attach on its being performed, does not vest. If the condition be that *A.* shall enfeoff *B.*, and *A.* do all in his power to perform the condition, and *B.* will not receive livery of seisin, yet, from the time of Lord *Coke* to the present moment, it has not been doubted, but that the right which was to depend on the performance of that condition, did not arise." In *Glazebrook v. Woodrow* (*a*), it was attempted to argue, that a covenant to pay the purchase-money for the assignment of a school, was independent of the correlative covenant to convey the school; but the Court held, that, according to the cases of *Kingston v. Preston* (*b*), and *Jones v. Barkley* (*c*), the conveyance must be tendered before the price could be exacted. So here, the Plaintiff was to return to *London*, and there deliver his cargo, and until he shall have done it, he is not entitled to recover his compensation on this covenant. In *Lancashire v. Killingworth* (*d*), *Holt*, C. J., thus lays down the rule: "The reason of all those cases, is, that when the Plaintiff himself is to do an act, and that act is not done, he ought to show to the Court that he had done every thing that was in his power." That was an action on a covenant to transfer stock, and the Plaintiff alleged that he was ready, and offered to make the transfer, but that the Defendant was not willing to accept it; it was urged that the allegation of his unwillingness was sufficient, and that the Plaintiff had done all he could do; but the Court held, that he ought to have averred an actual tender, and a positive refusal by the Defendant. *Smith v. Wilson* (*e*), too, is a much stronger case than this, for the declaration therein averred an actual dispensation with the voyage, yet the Court held, that, "as the ship had never arrived at her destined port, within the terms of the charter-party, the freight claimed in the declaration never became demandable by law;" and they recognized the case of *Cook v. Jennings* (*f*), where it was decided, that upon a covenant to "pay freight at seven pounds per standard hundred for deals delivered in *Liverpool*," the Plaintiff, averring a shipwreck, and the consequent landing of the cargo in the course of the voyage, and that the Defendant there accepted the deals, and sold them for his own use, was not entitled to recover freight *pro rata itineris*.

Vaughan, Serjt., *contra*, contended, that, although the Plaintiff had not alleged that he had carried the homeward cargo to *Lon-*

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(*a*) *Term. Rep.* 366.(*c*) *Doug.* 689.(*e*) 8 *East.* 437.(*b*) *Cit. in Jones v. Barkley. Doug.* 689.(*d*) 1 *Com.* 116.(*f*) 1 *Term Rep.* 381.

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don, yet that he had alleged a reason on the face of the record, which was a sufficient excuse for not going to *London*, and equally entitled him to his freight as if he had gone thither. In *Cook v. Jennings*, and *Worsley v. Wood*, Lord *Kenyon*'s doctrine had been mis-stated, for there *B.* was a stranger, whose consent to the feoffment *A.* undertook to obtain; but if it be the act of the Defendant that prevents the Plaintiff's performance, the effect is different. In *Smith v. Wilson*, all that the Plaintiff could do, was, to take certain remote steps which might put him in a way to perform, but Lord *Ellenborough*, C. J., remarked, the actual event of performance did not depend upon the Plaintiff, but on the act of God, &c., and the utmost of his endeavours was therefore only a step towards performance, and could not entitle him to recover: therefore that case is not relevant. In *Cook v. Jennings*, *Lawrence, J.*, furnishes the Plaintiff with a complete answer to the argument drawn from *Worsley v. Wood*; he observes that "the Plaintiff is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owner of the goods prevents him, nor is he entitled to freight *pro ratâ*, unless under a new agreement." To adapt the same doctrine to the present case: this is not a new voyage, it is a stopping short at *Liverpool*, instead of going on to *London*; but if the shipper accepts the goods at *Liverpool*, he renders it unnecessary to carry them on to *London*. *Hotham v. The East India Company (a)*: that was the case of a voyage from *London* to *India* and back to *London*. On the homeward voyage, the ship sunk at *Margate*, the *East India Company*'s servants went to the spot and fished up a part of the cargo, which was pepper, and rendered it marketable. The ship was weighed up and arrived at *London* with a small part of the cargo on board. In an action brought on four feigned issues to try whether freight were due, the charter-party appeared to contain a clause that freight was to be paid only if the ship performed her voyage and arrived in *London* in safety, and not otherwise. And by another clause it was provided that, in case the ship did not arrive in safety in the *Thames*, and there make a right delivery of the whole and entire cargo, the Company should not be liable to pay any of the sums of money therein before agreed to be paid for freight and demurrage. Lord *Mansfield*, C. J., "had no doubt, but that if the delivery at *Margate* was, in the contemplation of the parties, substituted for a delivery at *London*, it might have been averred in

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(a) *Doug.* 272.

an action of covenant, because there can be no material fact in a cause, which may not be put upon record, or given in evidence on the general issue." And *Buller, J.*, says, "There could have been no doubt on the subject of the first issue, if the parties had gone on in the usual way, by an action of covenant on the charter-party. If an act undertaken to be done is dispensed with by the other party, it is sufficient so to state it on the record; special pleading being nothing but a bare narration of facts in a legal form." That case is scarcely distinguishable from the present case, except that the latter is the stronger. *Shepard v. De Bernales (a)*, the Plaintiff covenanted that the ship should go to *Tangiers*, and there apply to the Defendant's agent for orders whether he was to deliver the cargo there, or proceed to *St. Lucar*, or *Cadiz*, and that he would make true delivery of the cargo, agreeably to bills of lading. He was there directed by Defendant's agent to go on to *Cadiz*, and was thereby prevented from delivering his cargo to the Defendant's agents at *Tangiers* or *St. Lucar*, in conformity to the bills of lading; and he delivered his cargo at *Cadiz*, agreeably to the orders of the Defendant's agents. And it was urged, the Plaintiff had no right at all to deliver the goods at *Cadiz*, *Cadiz* not being mentioned in the bills of lading, and that his act laid him under the necessity of demanding the freight of the consignee at the place; but the Court held the contrary. It is needless to cite *Jones v. Barkley* and other similar cases. Where the charterer insists on the master's going to *Liverpool* instead of *London*, surely this is a dispensation.

Best, in reply. The Defendant's argument remains unshaken. The Defendant does not contend that the Plaintiff alleges he has done the thing covenanted: the argument is this, the Plaintiff may have done a thing which entitles him to another action, he has not done the act which entitles him to this action. He avers that he has performed, with the exception that *Liverpool* and not *London* is the port of delivery. The only agents mentioned in the charter-party are the agents at *Gibraltar*: they may order the master to load at *Gibraltar*, *Malaga*, *Seville*, or *Cadiz*, but the charter-party notices no agent at *Cadiz* or *Seville* authorized to send the vessel forward from thence; and even if it may be considered that an allegation that this was done by the agent, is equivalent to an allegation that it is done by the Plaintiff himself, which is highly questionable, yet under a parol direction

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(a) 13 *East*, 565.

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given by the Plaintiff in contravention of the charter-party, the right of action here insisted on does not arise. The Plaintiff himself could not under this contract send the ship to two of the three places, only to one: he sends her to *Cadiz*, and there a person who could have no right so to do, sends her on to *Seville*, and thence to *Liverpool*, and after this allegation the Plaintiff concludes his declaration with the erroneous inference, "and so the Plaintiff has performed the voyage." The Plaintiff's counsel has argued that *Liverpool* was in the course of the voyage from *Seville* to *London*, but the fact is not so: *Liverpool* is more distant from *Seville* than *London*, and is not in the course of the voyage. It has been supposed that the doctrine cited from *Ro. Ab.* is stated by Lord *Kenyon* in a manner more favourable to the Plaintiff in *Cook v. Jennings* than it is in *Worsley v. Wood*, because in the former he notices the exception of a frustration by the act of the covenantee. But, to enable the Plaintiff to recover, that frustration must distinctly appear to be by the act of the covenantee. The one report and the other are equally favourable to the Defendant's argument. It is said there was only an endeavour, but there was an offer to go the voyage. In the case of *Hotham v. The East India Company*, it is clear that the goods were taken out by the owners and carried to *London*, and the vessel itself was got up and carried to *London*: the owner anticipates the ship, and takes the goods, and carries them himself. But even if that case be considered as decided on the substitution of another contract, yet it was in the loose form of a feigned issue, not an action of covenant, and what Lord *Mansfield* and *Buller* say, were *obiter dicta*, and not a decision; and subsequent cases, too, prove that a plaintiff must declare on the new bargain; but *Lawrence, J.*, also says, in *Cook v. Jennings*, that a substitution is a new agreement. In the case of *Shepard v. De Bernales* the vessel was bound by the charter-party to go to *Cadiz*, and her going was therefore a performance; and the case is dissimilar. The Defendant relied on the diversity between the bills of lading and the delivery; but the charter-party warranted that voyage. Here the charter-party does not warrant this voyage. The Plaintiff is to be paid his freight in *London*, by bills at two months from the delivery of his cargo in *London*. How can the Plaintiff on this form of action entitle himself to those bills?

Cur. adv. vult.

GIBBS, C. J., now delivered the judgement of the Court. This is an action of covenant on a charter-party for freight; and the declaration

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declaration states, that by a charter-party made between the Plaintiff, master of the brig *Fortitude*, and the Defendant, the master covenanted that the vessel, being then tight and staunch, should immediately receive and take on board at *London*, from the freighter, all such goods as the freighter should choose, not exceeding what she could reasonably stow, and immediately sail for *Gibraltar*, where the said master should make a right and true delivery, and having delivered, and being again ready to load, would receive at *Gibraltar* or at *Malaga*, *Cadiz*, or *Seville*, as should be ordered by the freighter's agents at *Gibraltar*, all such goods as the said agents of the freighter at *Gibraltar* should think fit to load, and proceed, wind and weather permitting, and return directly to the port of *London*, where, being arrived, he would make a true delivery thereof. The declaration then states, other subsequent parts of the charter-party. It next states the engagement, that the Defendants would well and truly pay or cause to be paid to the said master for the voyage out and home 550*l.*, with 5 *per cent.* primage, and a gratuity; that 200*l.*, one part of that sum, was to be paid on clearing outwards, 200*l.* on delivery of the outward bound cargo at *Gibraltar*; one equal moiety of the residue was to be paid in cash forthwith, on the delivery of the homeward cargo in the port of *London*, and the residue by a bill on *Macarthy* and *Brown*, payable in *London* at two months from the completion of the delivery. There is nothing further material in the charter-party. The declaration then proceeds to state the ship's sailing on the voyage, her arrival, and the delivery at *Gibraltar*, her direction to *Cadiz*, arrival at *Cadiz*, and her direction there, received from the freighter's agent there, whom he expressly averred to be sufficiently authorized by the Defendant to give those orders, so that it must be considered as the order of the Defendant himself to proceed to *Seville*; that the Plaintiff did proceed to *Seville*, gave notice of arrival, and received on board, from the freighter's agents or assigns, such goods as the freighter's agents there thought fit to load, and were tendered to him, and being despatched therewith, set sail from *Seville* direct for *Liverpool*, being the port appointed, and substituted for the port of *London* as the port of delivery of and for the homeward cargo, arrived with the homeward cargo at *Liverpool*, was ready to deliver, gave notice of his arrival and readiness, and made a true delivery at *Liverpool*, agreeably to the bills of lading signed, and that the homeward bound cargo was there, at *Liverpool*, received by the freighter's agents or as-

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signs, and that so the voyage was ended according to the form and effect of the charter-party. He avers, that he should have been ready to proceed to *London* instead of *Liverpool* with the homeward cargo, if the Defendant had not dispensed with his so doing, and substituted *Liverpool* as the port of delivery, and received the cargo there: the Plaintiff claims freight and demurrage. The only question in this case is, whether a delivery at *Liverpool* can be so substituted for a delivery at *London*, as to enable the Plaintiff to recover, upon this covenant, the same freight and demurrage as if he had delivered the cargo at *London*. The maxim of law which meets one in this case, is, that matters which are contracted for by deed, cannot be dissolved except by deed. The deed stipulates that the delivery shall be at *London*, and the question is, whether *Liverpool* shall be substituted. The objection is, that the stipulation by deed cannot be dissolved by parol. At the same time the doctrine of Lord *Mansfield*, C. J., and *Buller*, J., in the case of *Hotham v. The East India Company*, certainly is extremely strong. There the vessel was sunk, a part of her cargo, which consisted of saltpetre was lost, the residue of her cargo, which consisted of pepper, was got out of the ship by the servants of the Company, who assumed the care and treatment of it at *Margate*, and by an expensive process rendered it saleable: the vessel also was weighed up, and the Plaintiffs might have brought on the whole of the pepper to *London*, instead of the small part which they brought; but the Company's servants took to the pepper at *Margate*; and it was understood between them, that upon the delivery of the pepper to them by the Plaintiffs at *Margate*, freight should be paid as if the delivery had been made at *London*, according to the letter of the charter-party. Upon the refusal of the defendants to pay, an action of covenant on the charter party was first brought; but the Plaintiffs finding themselves hampered in that form of action by the rules of pleading, it was agreed between the parties, in order to disentangle the case from technical difficulties, that they should try it on feigned issues. Lord *Mansfield*, C. J., and *Buller*, J., in giving judgement on the case were obliged to consider the effect of the charter-party, because it was on the effect of the charter-party that the issues must be decided; and they do, in express terms, say, that if an agreement had been made in the course of the voyage, that the cargo should be delivered at a different port from that which was stipulated for in the charter-party, and if that substituted contract was performed,

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the compensation for it might be recovered in an action of covenant framed on the charter-party. It is very singular that in no subsequent case is that doctrine ever alluded to, or introduced, though many cases must have occurred, to which it would apply. Possibly the Courts have not thought it necessary further to consider a mere *dictum*; but I can find no judgement of any Court in which the Court has referred to those *dicta* (a). In one, and only in one case, do the counsel in argument allude to them, but the Court does not notice the argument. In such circumstances, therefore, we are to look to subsequent decisions, and see how far such *dicta*, though coming from so high an authority, have been recognized. On the other hand, we find in previous, as well as in latter decisions, many things which have an aspect the other way. *Blemerhasset v. Pierson* (b). Debt on bond conditioned for payment of several sums at several days: the Defendant pleads payment of all such of the sums as were due before a certain day, at which day the Plaintiff, by his certain writing, which the Defendant produces here in Court, signed under his hand, agreed to defer the payment of the residue until another day, which is not yet come. The Plaintiff demurred generally, and judgement was given for him; for the action being founded on a deed, no defeazance could be afterwards made thereof without deed; and a writing "signed under his hand" does not imply a deed. Here it is agreed by deed, that the delivery of the homeward cargo shall take place at *London*; here also is a subsequent parol agreement, that the homeward cargo shall be delivered at *Liverpool*: that parol agreement, therefore, cannot control the deed. And it is observable that in the case of *Hotham v. The East India Company*, this point was never made. In the case of *Littler v. Holland* (c), a question was made whether the doctrine of dispensation of the time applied to instruments under seal. The question first arose in the case of *Warren v. Stagg*, tried at *Sarum*, before *Buller, J.*, where the parties had by compact varied the time for the delivery of some barley sold, and he held it was a continuation only of the first contract. There both the contracts were by parol; but in *Littler v. Holland* (d), evidence that the houses were built within the time enlarged by parol did not support an action on the covenant. *Brown v. Goodman* (e) is the next case, and it decides, that if a

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(a) To this observation the bar acceded. (d) 3 T. R., 591. Cit. in *Littler v. Holland*.

(b) 3 Lev. 234.

(c) 3 Term Rep. 592. n.

(e) 3 Term Rep. 590.

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bond be for performance of an award to be made by a certain day, and the time be enlarged by parol, the obligee cannot, in an action on the words of the penalty therein mentioned, recover for the non-performance of the award made within the enlarged time. I cannot distinguish that case from this. The case of *Leslie v. De La Torre* (a), cited in *White v. Parkin* (b), decides, that where a charter-party allowed certain running days for waiting for convoy at *Portsmouth* and *Ferrol*, the parties could not by parol substitute *Corunna* as the place to wait for convoy, instead of *Portsmouth* or *Ferrol*. Sittings after *Trinity* term, 1795, before Lord *Kenyon*, C. J. Debt on a charter-party against the freighter: the facts were as I have stated; and after an objection taken to the form of the special count, it was urged that the Plaintiff could recover in debt on the count for a *quantum meruit*; but Lord *Kenyon* held, that the agreement by charter-party being under seal, the Plaintiff could not set up a parol agreement inconsistent with it, and which, in effect, was meant to a certain extent to alter it. This then was a decision that the action being intended to be brought on the charter-party, another and a parol contract could not be substituted for the former. Upon what ground? Upon the ground that the parol agreement to wait for convoy at *Corunna* did not dispense with the waiting for convoy at *Portsmouth*, if the Plaintiff meant to recover on the charter-party. So here is an agreement by deed to deliver the ship's homeward loading at *London* and an agreement by parol to deliver it at *Liverpool*. It seems to follow as a consequence, that the Plaintiff cannot recover on the charter-party for freight, for the delivery at *Liverpool*. In the case of *Cook v. Jennings*, the *dictum* of *Lawrence, J.*, goes to establish the point that a parol agreement, supposing it can be entered into, does not vary the covenant. The case of *Heard v. Wadham* (c) is very material. *Watts*, before he became a bankrupt, had covenanted to execute certain conveyances to the covenantees, and the covenantees covenanted to make certain payments to him. On account of mortgages, and previous conveyances which the mortgagor had made, the state of the title rendered it impossible for *Watts* to execute such conveyances as he covenanted. At the same time he could procure that which was equivalent, conveyances from the mortgagees, and the purchaser was willing to take them. In that state of things, the assignees of *Watts* brought covenant for the purchase money, and the Court held that an action upon the cove-

(a) 12 *East*, 583.

(b) *Ibid.*

(c) 1 *East*, 619.

nant would not lie; and what *Lawrence, J.*, says in his judgement is material. "All the cases cited, where a substitution of one thing for another was admitted, were cases where, subsequent to the breach of covenant, the covenantee had agreed to accept another thing in satisfaction of his damages, which was an answer to an action for the non-performance of the thing stipulated." I can understand that doctrine, that a man has been paid his damages by accepting something else in lieu of that to which he was entitled: but it is most expressly laid down, that in covenant on a charter-party the Plaintiff must show that he has done all which lay on him, of that which the covenant required him to do; and he cannot aver, that by parol something else is substituted for it. Upon consideration of all these cases, we feel ourselves compelled to say that notwithstanding the high authority of those *dicta* in the case of *Hotham v. The East India Company*, these cases in which a contrary doctrine has prevailed, are of higher authority; and that the judgement must, therefore, be entered

For the Defendant.

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DOE, on Demise of DAUNCEY, v. DAUNCEY.

June 25.

THIS was an ejectment brought to recover a customary estate. Upon the trial of the cause at the *Horsham* Spring assizes, 1817, before *Bosanquet*, Serjt., it appeared that the premises were parcel of the manor of *Ditchling*, and that on the 1st November, 1723, upon the surrender of *P. Martin*, *John Dauncey* and *Ann* *his wife were admitted to hold to them, during their lives and the life of the survivor, with remainder to the heirs of their bodies, with remainder to the right heirs of *Ann*. That they had four sons and two daughters, and died leaving *Josiah Dauncey*, their youngest son and heir at law, according to the custom of the manor, which was of the nature of *Borough-English*, who, in 1774, was admitted to hold to him in fee. He surrendered to the use of his will, and devised the premises to the Defendant, and died without issue. The Plaintiff claimed under the entail of 1723. To prove that the estate tail was not barred by the surrender of *Josiah Dauncey*, the Plaintiff produced in the Court Rolls numerous instances, as many as twenty, of recoveries suffered to bar estates tail; there was one instance of a simple

Concurrent customs in a manor to bar entails of copyhold by recovery, and by surrender, are not inconsistent; and slight evidence suffices to prove the latter, because it is adverse to the interest of those who make the evidence.

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surrender of a tenant in tail, in 1806. After his decease there was a presentment of it, and that *W. Elliot* was admitted to the reversion. The steward's fees on recoveries were more considerable than on surrenders. For the Defendant were cited, *Roe, on the Demise of Bennet, v. Jeffery (a), Everall v. Smalley (b), Erish v. Rives (c)*. A strong address was made to the jury by the Plaintiff's counsel, on the improbability of a custom to bar estates tail by a mere surrender. *Bosanquet*, Serjt., stated to the jury, that the bar by surrender was the cheapest mode, the most for the interest of the copyholders, and the least for the interest of the steward; and the circumstance of its being admitted on the rolls by the steward that there was an estate tail barred by surrender, was therefore strong evidence of the existence of the custom; he stated that he thought that the custom to bar estates tail by surrender was proved, not as a conclusion of law, but of fact. He directed them, that he thought, in point of law, they were at liberty to find this custom, and he advised them so to do, and they so found.

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Vaughan, Serjt., in *Easter* term moved for a new trial. He admitted that there might be concurrent customs in a manor, the one to bar estates tail by a recovery, the other to bar them by surrender; but the evidence showed that the ordinary mode of barring entails in this manor was by recovery and not by surrender. The instance of the surrender in 1806 was by a tenant in tail, who was also reversioner in fee, so that he had a right to surrender his entail. [*Curia contra*. He had a right to surrender his life-estate, and to surrender his reversion in fee: he could not surrender his estate tail without a custom.] In the case of *Roe, on Demise of Bennet, v. Jeffery*, on which the learned Judge much relied, there was an acquiescence of fourteen years: here the surrenderer was still alive, and no one could dispute the possession. In that case, *Dampier, J.*, while he admits that a single instance is evidence to prove a custom, holds, that if frequent instances of barring by recovery had been proved, which he says is inconsistent with the mode by surrender, there would have been weight in the argument: too much stress was laid on the evidence as proving the custom.

The Court granted a rule *nisi*.

Lens and *Pell*, Serjts., in this term showed cause against the rule. Unless the evidence were so defective as not to justify a jury on their finding, or unless the law laid down by the learned

(a) 2 Maule & Selw. 92.

(b) 1 Wils. 26.

(c) Cro. El. 717.

Judge were wrong, this rule must be discharged. [The Court directed them to confine themselves to the latter point.] The learned Judge only left the case to the jury with a strong impression of his opinion as to the fact. An opinion which was justified by the evidence; for the custom is adverse to the interest of the steward, and therefore it is very strong evidence against him, that he has put on the rolls a bar of an entail by surrender. It only is a question whether this one last instance, in the opinion of the jury, outweighs the former and contrary instances. In the case of *Roe, Dem. Bennet, v. Jeffery, Heath, J.*, thought it so strictly a question of law, that he so ruled it; but here the learned Judge considered this only as a question of fact with a strong recommendation. And it is no inconsistency that the two modes of barring entails should be concurrent. If a new trial is granted, the case must again be left to the jury with a similar direction. Since the case of *Everall v. Smalley*, a case came from the Midland circuit in which *Clarke* and *Vaughan* were of counsel, wherein it was held that a single instance might be evidence of a descent according to the nature of *Borough-English*. This mode of bar by surrender ought to be favoured, on the principle laid down in *Strange (a)*, that it is the most natural, and the cheapest.

Vaughan was called on by the Court, to support his rule. Here the time had not arrived in which it became the interest of any person to contest the validity of this course. *Josiah Dauncey's* surrender, which is to affect the Plaintiff, is of 1774. The surrender sought to be given in evidence is of 1806, to bar an entail of 1723. This is an *ex post facto* custom. The question is not, whether there were a custom in 1806, but whether such custom subsisted in 1774, of which there is no evidence. Here is clear evidence of a custom to bar entails by recovery. There are but three modes in which it can be done; first, by forfeiture and re-grant; secondly, by recovery; thirdly, by surrender. If there be no custom to surrender, it may be done by recovery without a custom. It was determined in *Everall v. Smalley*, and *Doe, on Demise of Wightwick, v. Truby (b)*, that it may be done in both ways; and in Lord Hardwicke's time, *Carr, on Demise of Dagwall, v. Singer (c)*, by three Judges, *Birch, Burnett, and Abney, Willes, C. J., dissentiente*. If those who are most interested acquiesce, it furnishes a strong inference of enjoyment. The judgement of the Court in *Roe v. Jeffery* is different from this: there had been, as Lord *Ellenborough, C. J.*, expresses it, thir-

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(a) *Str.* 1198. *Everall v. Smalley*.(b) 2 *Bl. Rep.* 944.(c) 2 *Ves.* 604.

1817: teen years' unresisted enjoyment. The steward would be compelled to receive this surrender, he could not resist it, and the surrender in the single instance is received by the deputy steward, not by the steward himself. This was mixed matter of law and fact, and the jury have been restrained and fettered by the very strong terms in which the learned Judge directed them.

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GIBBS, C. J. The doctrine held in the cases of *Doe v. Truly*, and *Carr d. Dagwell, v. Singer*, is, not that it is necessary to have a custom, to bar an entail by surrender, but that if no custom for barring it by recovery or any other mode be proved, a surrender will be sufficient to bar an entail, without a custom. We think that some points may arise in this case, which have not been fully adverted to, perhaps from its having been argued only on one side at the trial. I certainly agree with most of the doctrine laid down by my Brother *Bosanquet* at the trial: I agree with him, following *Heath, J.*, that a surrender is the cheapest and most natural mode. I agree with him that there may be concurrent customs: I agree that the tendency of human nature is such, that an ignorant tenant, coming to a steward, would be most naturally directed to suffer a recovery. The question here, is not, whether a custom to bar entails by surrender exists adversely to the other, but whether both do not exist. I think this instance is strong evidence, because the taking of this very surrender occurring but a few years ago, done with the very intent of barring an entail, with the knowledge and acquiescence of him who was most interested in promoting the custom to bar by recovery, strongly sanctions this attempt to bar by surrender. I do not think I should have much differed from my Brother *Bosanquet* in his directions to the jury on this point; but there are several other points which appear not to have been sufficiently considered, and we must defer our judgement.

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Cur. adv. vult.

GIBBS, C. J., now delivered the judgement of the Court. We think it better to say nothing on the facts of this case, and the bearings of the evidence, that our opinion may not prejudice the cause. If I were to try the cause, I should probably direct the jury nearly as my Brother *Bosanquet* did, but there are reasons in the case, that make us think it desirable to submit the cause to a further inquiry.

Rule absolute.

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DAVIS v. LORD RENDLESHAM.

May 25.

THE Plaintiff sued the Defendant by bill, and *Copley*, Serjt., on a former day, citing *Littledale v. Lord Lonsdale* (a), obtained a rule *nisi* for setting aside the proceedings as irregular, upon the ground that the Defendant, who was a peer of Ireland, could only be sued by original writ.

If an *Irish* peer is sued by bill, this Court will not stay the proceedings on motion, but will put him to plead his privilege in abatement.

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Best, Serjt., afterwards showed cause. In the case cited, the Court did not relieve on motion, but the privilege of peerage was pleaded in abatement, and the Court would in this instance require the Defendant to pursue the same course. Nor did the reason of that case extend to actions in this Court. If a Plaintiff proceeded by bill in the Court of King's Bench, he supposed the Defendant to be in the custody of the Marshal of the Marshalsea, wherein a peer of the realm cannot legally be. In none of the cases has the Court relieved on motion. *Gosling v. Lord Weymouth* (b), and *Hosier v. Lord Arundell* (c), confirm the doctrine that the irregularity must be pleaded in abatement. In the Countess of *Huntingdon's* case (d), the application for a *superseas* was made before plea pleaded. There too, as well as in Lord (e) *Banbury's* case, the Defendant was in custody, which was a much stronger ground for the application than here existed.

The Court, relieving *Best*, called on *Copley* to support his rule, who contended that relief might be given indifferently by plea in abatement or on motion. In the case of *Brisco v. Earl of Egremont* (f), it had recently been held, that the only question was whether the process were proper; if it were not proper, the Court would relieve equally upon plea in abatement and upon motion. It was immaterial, whether it were a bill of *Middlesex*, or an original and summons. In the Countess of *Huntingdon's* case, the Court interfered upon motion, it appearing on the record that she was a peeress, and they discharged her. So where the Defendant was sued by the name of *Charles Knollys*, Esq., the Court held, that if on the record he had been called Lord *Banbury*, the Defendant might have been discharged. It is the continual practice to relieve on motion where the Defendant might plead in abatement. It is next objected that the Defendant's

(a) 2 H. Bl. 267. & 299. (c) 3 Bos. & Pull. 12. (e) Salk. 612. S. C. Ld. Raym. 1247.
(b) Cowp. 844. (d) Anon. 1 Vent. 298. (f) 3 Maule & Selw. 88.

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 RENDLESHAM. affidavits are not positively sworn. He swears to information and belief, which makes a *prima facie* case, and if not correctly sworn, it may be contradicted. In the case of *Dawson v. Burridge*, it was argued that this Court could not hold plea against members of parliament by bill; but the Court held that a Defendant having privilege of Parliament may be sued by bill here. In the case of a misnomer, the Defendant may either apply to this Court by motion, to discharge him, or he may plead the misnomer in abatement.

BURROUGH, J., observed, that in the case of *Briscoe v. Earl of Egremont*, the case of (a) *Harris v. Lady Napier* was not mentioned, in which all the Court agreed that they would not discharge the Defendant on motion

GIBBS, C. J. This case widely differs from many of those in which the Court grants relief on motion. In the case of an arrest by misnomer, if the Court did not relieve, the Defendant might be under some difficulty in pleading in abatement: here, unless it were as clear as the sun that this matter could successfully be pleaded in abatement, the Court would not grant relief on motion.

Cur. adv. vult.

On this day, GIBBS, C. J., delivered the opinion of the Court. This was an application to set aside the proceedings, on the ground that the Defendant was sued by bill, whereas, being an *Irish* peer, he ought to have been sued by original. Without saying more, we are of opinion, that as this matter may be pleaded in abatement, it must be so pleaded. The rule therefore must be

Discharged.

(a) The Reporter has not been able to find this case.

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June 25.

NIXON v. BURT.

REED v. BURT.

Where the mayor of a corporation summons a corporator to attend a corporate meeting for the purpose of an election, in obedience to a writ of mandamus which is understood to be addressed to the mayor solely, and not to the class of corporate officers to which that corporator belongs, that corporator if arrested while in attendance on that election, will not be discharged from his bail-bond on motion.

Especially if there be ground to suspect collusion.

Semble, that a non-resident corporator is out of the reach of the summons of the presiding corporate officer to attend a corporate meeting, for the purpose of an election, and need not be summoned. *Quere.*

borough

borough of *Bridgewater*, by the name of the Mayor, Aldermen, and Burgesses of the borough of *Bridgewater*, and directed that there should be one mayor and two aldermen, on whose death or removal the rest of the capital burgesses, or the greater number of them, should choose one or two other of the capital burgesses in their place; and that there should be eighteen of the best and most honest of the burgesses chosen by the mayor, recorder, and aldermen, who should be called the capital burgesses and council, which eighteen should be called the common council of the borough, and should continue in office so long as they should behave themselves well therein; and whenever one or more of them should die, or be removed, the other capital burgesses, or the greater part of them, should choose another or others of the burgesses of the borough in their place; and that he or they so chosen, taking a corporal oath before the mayor, aldermen, and other capital burgesses, or the greater part of them, should thenceforth be of the number of the eighteen capital burgesses; and that the mayor and common council might make, from time to time, of the inhabitants of the borough, free burgesses of the same borough, and bind them by oath to obey the mayor and aldermen in all lawful commands. That by another charter of 8th *December*, 35 *Car. 2.*, there were to be twenty-four capital burgesses to be chosen by the mayor, recorder, and aldermen. That by the usage and custom of the borough every person entitled to be admitted and sworn into the office of capital burgess, could only be admitted and sworn into that office by and before the mayor and capital burgesses, or the major part of them; and surmising that an alderman and four capital burgesses were lately deceased, and that no election had since been had, and that divers persons were entitled to be sworn into the office of free burgesses, but that the mayor and capital burgesses had neglected to hold meetings for admitting them; and that although the mayor had duly issued his summons to the aldermen and common council, for the purpose of electing such of the inhabitants to be free burgesses as the mayor, aldermen, and capital burgesses should deem fit; "a sufficient number of capital burgesses could not attend, in pursuance of such summons, to constitute a legal assembly, in contempt of the King, and to the manifest obstruction of public justice within the borough;" it proceeded thus: "Therefore, we being willing that a due and speedy remedy should be applied, do command (a) 'you, and every of you,' that immediately after the

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(a) The direction of the writ was not particularly inspected during any part of the proceeding here reported.

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receipt of this writ, you do meet at the burgess-hall, within the *Guildhall* of the same borough; and that you do then and there, in due manner, elect, nominate, make, and swear, and cause to be done every act necessary to be done by you and every of you, in order to the election and nomination, making and swearing of one of the capital burgesses of the said borough to be an alderman of the said borough, in room of the deceased alderman, and to admit and swear into the office of free burgess every person entitled to be admitted into that office who shall tender himself; and that you do then and there, in due manner, elect, make, admit, and swear such inhabitants of the said borough as you, or the major part of you shall think fit to be free burgesses, and in due manner elect, nominate, make, and swear, and cause to be done every thing necessary to the election, nomination, making, and swearing, of four of the free burgesses of the said borough to be capital burgesses or counsellors of the borough, in room of the deceased capital burgesses, or that you signify to us cause to the contrary thereof," &c. This writ being served on the mayor, upon the receipt thereof, he issued, amongst others, a summons signed by him, and directed to the Defendant, as follows:—
 "Borough of *Bridgewater*. To the Rev. C. H. Burt, capital burgess and common councilman of the said borough. In obedience to His Majesty's writ of *mandamus*, a copy whereof is hereunto annexed, you are hereby summoned to appear, and give your attendance, at the council-house, or burgess-hall, within the *Guildhall* of the said borough, on *Monday*, 2d *June* next, by 11 o'clock in the forenoon, at a court of convocation of the mayor, aldermen, and burgesses, the common council of the said borough, to be then holden within the same house; and also to treat and confer on the good government of the same borough." The Defendant was served with this summons, and with a copy of the writ of *mandamus* thereto annexed, in *London*, on 28th *May*, by the same attorney who defended these actions. He left *London* on 31st *May*, and on 2d *June*, before the corporate meeting, he was arrested at *Bridgewater* in these three actions: he informed the officer of the cause of his coming to *Bridgewater*, and showed him the copy of the *mandamus*; but the officer refused to discharge him, whereupon he gave bail-bonds. He afterwards, on the same day, attended the corporate meeting, and concurred in electing an alderman, four free burgesses, and four capital burgesses, in obedience to the writ. On the same day he returned to his residence in *London* with all diligence.

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Pell, Serjt., upon an affidavit of these facts, had with difficulty, and not until the second application, obtained rules *nisi* to set aside the bail-bonds given in these three causes, upon entering a common appearance.

Lens, Serjt., on a subsequent day, showed cause. He observed that no decided case bore any analogy to the present. It was incumbent on the Defendant to bring himself within the reason of some decision, in which this privilege (an exception to the ordinary rules of practice) had been granted. This was to stand on the same ground as the case of witnesses. *Meekins v. Smith* (a), in which the privilege was held to extend to every party who had any relation to a suit even to a barrister, who was not bound to attend, as an attorney was, is the largest case extant; yet it does not comprehend this case. In (b) *Spence v. Stewart*, the like privilege was allowed to a witness attending an arbitrator. Soldiers are protected under the express provisions of the mutiny act. Bail, too, are protected, though their attendance is voluntary. So, justices of the peace, attending the quarter sessions; but the reason is, that possibly there may not be justices enough to make a session, though generally there are more than two present. So, jurors of a court-leet, attending their duty there, are protected; but all these instances are for the administration of justice, to which the proceedings of a corporation bear no analogy. The *mandamus* is not directed to the Defendant, but to the mayor: nothing but the mayor's summons is directed to the Defendant. He is summoned in *London* to attend a meeting at *Bridgewater*. *Non constat* that there would not have been a meeting without him.

Pell, Serjt., in support of the rule, agreed that all cases of privilege are exceptions from the common rule, that the general law of the land enables a creditor to arrest his debtor. He admitted he had found no case in point. This rule would depend on the weight and authority which the *mandamus* carries with it. The writ, after setting forth the constitution of the borough, and the number of mayor, aldermen, and burgesses, and that there were four vacancies, directs that a meeting should be held for filling up those vacancies by the electors, of whom the Defendant was one. It recites, that a corporate meeting could not on a late occasion be held, because of the non-attendance of the corporators. It is true the *mandamus* is directed to the mayor: it can only be directed to one person, it can only be delivered to

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(a) 1 *H. Bl.* 636.(b) 3 *East*, 89.(c) 6 *Co. Dig. fo.* 88. *Privilege.*

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one. It is a writ of a high nature, a prerogative writ, for securing the performance of an act, for want of which justice would be obstructed, or the King's charter neglected. This, therefore, relating to the King's charter, relates to a matter of a public nature. Suppose, owing to the non-attendance of this Defendant, a corporate meeting could not have been held, and the mayor had returned that he could not convene a sufficient number of corporators; there the return would be bad, and the mayor would be liable to an attachment; as he is, when, on an equal division of votes, no election can be had: the mayor who returns that no election can be had, is liable to an attachment. This brings it within the case cited by Lord Chief Justice *De Grey*, in *Miller v. Seare (a)*. Speaking of witnesses attending before commissioners of bankrupt. "Witnesses would be in a strange dilemma: if they do not appear they are liable to be committed by this Court (of Chancery) for their contempt; and if they do, they are liable to arrests." This class of cases is extending itself every day. In *King's case (b)*, the Lord Chancellor recently relieved a witness attending commissioners of bankrupt: persons attending to prove debts before commissioners had before been liberated. In *Cameron v. Lightfoot (c)*, *De Grey*, C. J., refers to every case of privilege that was then extant; and although among them there is no precise authority for the relief now prayed, yet the law is, on principle, extending every day. A creditor going to prove his debt, has been held to be protected. *(d) Ex parte List*. On what principle is it, that a barrister going on the circuit is privileged? A magistrate going to sessions is protected, not because it is shown that a sessions cannot possibly be held without him, but because possibly it may not. The object of this *mandamus* is to enable the mayor to execute the King's Charter. Is it possible that there can be a more important purpose than this, on the failure of which, the existence of the corporation may probably be discontinued, if this *mandamus* be not obeyed? The Defendant is served with a summons from the mayor to attend, issued in pursuance of a writ from the King. The corporator, therefore, obeys the King's writ, not merely the mayor. This comes within the 'excepting principles, though not within the excepted cases.

Lens, Serjt., replied on the cases. The attendance of the petitioning creditor is a form of carrying on a suit before that par-

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(a) 2 Bl. 1142.

(b) 1 Tidd Pr. 5. ed. 198. n.

(c) 1 W. Bl. 1190.

(d) 2 Rose, 24.

ticular tribunal, and *Kinder v. Williams* (a) shows, that though the Lord Chancellor determined that he could discharge a Defendant, the Courts of law have refused to pronounce the like judgement. *Cur. adv. vult.*

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GIBBS, C. J., now delivered the judgement of the Court. In these three actions the Defendant seeks to be discharged from his bail-bond, on the ground that he was arrested while he was on his way to attend an election of an alderman and free-burgess of *Bridgewater*, of which borough he was a capital burgess, and was summoned to attend an election of corporators under a writ of *mandamus*. No similar case has been decided, therefore we must consider this case on principle. Supposing that no *mandamus* had issued, it is quite clear that the Defendant's attendance on an election of corporators, for the purpose of voting at that election, would not have protected him from arrest. Such attendance is a circumstance of daily occurrence; but no instance is found in which a defendant has been discharged on that ground. In the present case, the *mandamus* is not addressed to the person making this application, but to the mayor. The case would be very different, if the *mandamus* had been addressed to the Defendant; and our reasons for this judgement do not apply to that case. It is said he might have become liable to an attachment for disobedience to the writ, occasioned by this arrest. Under certain circumstances, possibly he might; but unless certain circumstances concurred, he was safe. We do not think that a possibility of his being attached under a certain coincidence of circumstances is a ground of discharging him. In the case of *Cameron v. Lightfoot* (b), Lord Chief Justice *De Grey* says, "that the privilege is not considered as the privilege of the person attending the Court, but of the Court which he attends. And, therefore, the allowing or not allowing the privilege, is discretionary; and it hath been disallowed in collusive actions." Collusion is a strong ground to disallow the relief. Here are three actions, in all of which the Defendant is arrested. He need not have been summoned by the mayor, because he was out of the reach of his summons. It is a singular fact, that the person who serves him with the summons, is the Defendant's own attorney. This does look very much like a contrivance of the Defendant and his attorney, that he should be treated with a pleasurable journey to *Bridgewater* free of the consequences of this arrest.

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The rule therefore must be discharged in all the three cases.

(a) 4 Term Rep. 377.

(b) 1 W. Bl. 1190.

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JOHNSON v. NORTHWOOD.

Where in an action for assaulting, beating, and ill-treating, the Defendant, as to the assaulting and ill-treating, justified turning the Plaintiff out of his house, but the issue on the justification was found against him: the Court held that upon the whole justification a battery appeared admitted, and the excuse not being proved, the Plaintiff was entitled to full costs, without a judge's certificate.

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THE Plaintiff declared in trespass, that the Defendant, with force and arms assaulted and beat, bruised, wounded, and ill-treated him. The Defendant pleaded, first, not guilty. Secondly, as to the assaulting and ill-treating the Plaintiff, that *R. Bass* before and at the time when, &c. was possessed of a dwelling-house in the *parish of *Saint Mary-la-bonne*, that a certain boy, to the Defendant and *Bass* unknown, before the time when, &c. was unlawfully in the house of *Bass*, with force and arms unlawfully making a noise and disturbance, and at the time when, &c. was and continued therein making such disturbance, against the will of *Bass*, and during all that time disturbed *Bass* and his family in the quiet and peaceable occupation of his house, and thereupon *Bass* requested the boy to cease from making the noise and disturbance, and leave the house, which the boy refused to do; whereupon the Defendant, as the servant of *Bass*, and by his command, in defence of the possession of his house, just before the time when, &c., gently laid his hands upon the boy to remove him out of his house, when the Plaintiff, just before the time when, &c., unlawfully interposed to prevent the Defendant so acting as the servant of *Bass* and by his command, from turning the boy out of the house, and unlawfully assisted the boy in remaining therein, making such disturbance; whereupon the Defendant, as the servant of *Bass*, and by his command, at the time when, &c., gently laid his hands upon the Plaintiff in order to prevent him from unlawfully interposing to prevent the boy from being removed from the house of *Bass*, and being prevented from making and continuing such disturbance, and from unlawfully assisting the boy in remaining in the house of *Bass*, making and continuing such disturbance, as he lawfully might; which are the trespasses in the introductory part of that plea mentioned; without this, that he the Defendant was guilty of the supposed assault and trespasses, or any of them, elsewhere than in that dwelling-house. Thirdly, he pleaded, as to the same trespasses in the introduction to the second plea mentioned, that before and at the time when, &c. *Bass* was possessed of the dwelling-house in the second plea mentioned, that the Plaintiff, just before the time when, &c., was unlawfully in the house, and with force and arms

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armsmaking a disturbance therein, and at the time when, &c., continued in the house making and continuing such disturbance therein against the will of *Bass*, and during that time greatly annoyed and disturbed *Bass* and his family in the quiet occupation of the house: and thereupon *Bass* requested the Plaintiff to cease making such noise and disturbance; and to go out of the house, which the Plaintiff refused to do; whereupon the Defendant as the servant of *Bass*, and by his command, in defence of the possession of his dwelling-house, at the time when, &c., gently laid his hands upon the Plaintiff in order to remove, and did remove him from out of the dwelling-house of *Bass*, as he lawfully might: which are the same trespasses in the introduction of this plea mentioned; without this, that he the Defendant was guilty of the supposed assault and trespasses elsewhere than in that dwelling-house. The Plaintiff, in his replication, joined issue on the first plea, and to the two last replied, that the Defendant of his own wrong assaulted, beat, and ill-treated the Plaintiff in manner in the declaration mentioned. The Defendant joined in these issues. This cause was tried at the *Middlesex* Sittings after *Michaelmas* term, 1818, before *Gibbs*, C. J., when a verdict was found for the Plaintiff, with 1s. damages; but the jury found no specific sum for costs, and the associate entered the verdict for 40s costs. *Copley*, Serjt., in Hilary term, 1818, obtained a rule *nisi*, that the *postea* might be amended, by substituting 1s. costs for 40s. He cited *Page v. Creed* (a), *Smith v. Edge* (b), and *Brennan v. Redmond* (c).

Best, Serjt., in the same term showed cause, contending that on the plea itself it appeared that there had been a battery, and the verdict had found that the Defendant was not justified in it: the Plaintiff was, therefore, entitled to full costs, although the Judge had not certified. The laying of hands on the Plaintiff, which the Defendant admits, is an allegation of battery. Every intentional touching of another is a battery (d). "As if one hold another by his arm." In *Smith v. Edge*, the pulling about the Plaintiff was held to be a battery. In *Pace v. Creed*, the assault only was justified: but here the battery is stated on the record, by stating the laying hands on the Plaintiff, and pushing him out of the house. The *molliter* is gone, because the cause which the Defendant alleges is gone by the verdict; but the battery, which is attempted to be justified, remains. For the ill-treating, which the Defendant acknowledges, includes all the other trespasses,

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(a) 3 Term Rep. 391. (b) 6 T. R. 562. (c) *Ante*, I. 16. (d) *Co. Dig. Battery, A.*

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NORTHWOOD.

and amongst them the beating. And where it is said in *Williams v. Jones* (a), that every laying on of hands is not a battery, that depends on the intent wherewith the person is touched. It appears on the record, first, that the Defendant had no right to touch the Plaintiff; secondly, that the touching was intentional; thirdly, that the Defendant applied such a degree of force as to put the other out of the house.

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Vaughan, Serjt., and *Copley*, *contra*, urged that the general term, "ill-treating," would not include the beating, bruising, and wounding. Neither could a forcible and excessive battery, which is implied under the term "ill-treating," be justified by a plea of *molliter manus imposuit* (b). In *Gregory v. Hill* (c) the Court said "that though a plea of *molliter manus imposuit* would justify what the law considers as an assault, such as might be necessary to have put the party out of the house, without outrage and violence, yet it never was considered as any answer to a charge, such as was contained in that declaration, of beating, wounding, and knocking the party down." Although the Plaintiff chooses in his replication informally to repeat those charges of his declaration, which were not selected by the Defendant to be justified, he cannot thereby wrest the Defendant's *similiter* into a confession of the battery. Neither can any argument be raised on the declaration and plea of not guilty; for, on a charge of assaulting, beating, and wounding, if any part of the charge be true, the Plaintiff is entitled to a verdict, and, therefore, a verdict for the Plaintiff on that issue does not necessarily evince that the Defendant has been guilty of all those acts. It does not necessarily import more, than that the Defendant has been guilty of an assault; for, if it did, no certificate of the Judge could ever be requisite. The Plaintiff's counsel has argued, as if the Defendant professed to justify the trespasses in the declaration; whereas he only professes to justify the trespasses mentioned in the introductory part of his plea, which are by no means co-extensive with the declaration. The word ill-treating does not comprehend a battery. Next, as to the replication: in the inducement to the traverse in the replication, the word "beat" is introduced; but the inducement is immaterial, and cannot be (d) traversed. *Barter v. Ellis* (e), to a declaration for assaulting, beating, wounding, imprisoning, and ill-treating the Defendant, as to all the trespasses, except the as-

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(a) *Hardr.* 301.(b) *Co. Dig. Pleader*, 3 M. 16. p. 772. *ad calcem*, cites 2 Ro. 548. *Lutw.* 1436. 1483.(c) 8 *Term Rep.* 299. (d) 4 *Co. Rep.* 62. 1 *Wms. Saund.* 28. n. (e) *Co. Ent.* 303.

sault and imprisonment, pleaded not guilty; and as to the assault and imprisonment he justified, that by virtue of process he gently laid hands on the party to arrest him. But this *molliter* does not include the beating and wounding, but expressly excludes them. So, in a case in *Brownlow* (a). In *Carr v. Donne* (b), the declaration states an assault, battery, wounding, and imprisonment. The Defendant pleads, as to the force and arms, and the wounding, not guilty; as to the residue of the trespasses, a justification under a *capias ad satisfaciendum*, and that he *molliter manus imposuit* to arrest; yet judgement passed for the Plaintiff, because the Defendant had not pleaded to the battery. Whence it appears, that even though he professed to plead to the battery, yet as he only stated that he *molliter manus imposuit* to arrest the party, that does not import or cover a battery. There can be no battery without a touching. For where the Defendant drew a sword, and waved it in a menacing manner, but did not touch the Plaintiff, the verdict was properly found, guilty of the assault, but not guilty of the battery (c); but the least touching in anger is a battery (d). In the cases of *Page v. Creed*, and *Edge v. Smith*, issues were found by the jury; but no argument was raised on what was found by the jury, but on that which was admitted by the record. These pleas would not have been bad on demurrer. If one enter my house, and I raise my hand to put him out, it does not necessarily follow, that it shall be done with the smallest possible exertion of which the human frame is capable. In *Smith v. Edge*, the justification goes to the seizing and dragging with great force.

Cur. adv. vult.

On this day DALLAS, J., in the absence of the Chief Justice, delivered the judgement of the Court. This was an action of trespass for assaulting, beating, bruising and ill-treating the Plaintiff. The Defendant first pleaded the general issue, on which the jury find less than 40s. damages. The Defendant also pleads two special pleas, in each of which he drops the words beating, bruising, and wounding, and justifies the ill-treating; the substance is, that a boy was making a noise in the Defendant's master's dwelling house: the Plaintiff was assisting the boy and the Defendant turned him out, which are the same trespasses in the introductory part of the plea mentioned. Both these pleas are found against the Defendant, and the question is, whether this is a justification of the battery. In the pleas, to which I have looked

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(a) *Brownl. Red.* 483.

(b) *Carr v. Donne*, 2 *Vent.* 192.

(c) 1 *Vent.* 256. *Anon.*

(d) 6 *Mod.* 149. *Cole v. Turner.*

and

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(and it is to the introductory part of a plea that we must look for the meaning, if the body of the plea be at all doubtful, it will be seen that these pleas purport to justify the ill-treating, as well as the assaulting the Plaintiff. In the case of *Page v. Creed*, we have sought for the record of the plea, but it is not to be found; that case, therefore, must be taken from the printed report, and it there appears to be a plea which went to the assault only, so that it becomes the common case of a battery not justified. In *Smith v. Edge*, the plea which was pleaded to the assaulting, seizing, and grasping the Plaintiff, and dragging, pulling, and hauling him about, being found against the Defendant, a question arose, whether the battery was justified. The argument was, that the battery was not justified, because every gentle laying on of hands is not a battery; but the Court decided, that the laying hold of the Plaintiff, and turning him out neck and heels, was a battery, and that the plea justified the battery, as well as the assault: they decided that the battery stood admitted, and the plaintiff had his full costs. The only difference between this case and that is, that in *Smith v. Edge* nothing is said about the ill-treating, but the plea speaks about the battery: here nothing is said of the battery, but the plea speaks of the ill-treating. The case of *Page v. Creed* does not apply; and we are of opinion, that the Plaintiff ought to have his costs, there being a justification of the battery, which is not being found by the verdict.

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Rule absolute.

June 23.

MATTHEW and WIFE CONUSORS.

Fine permitted to be acknowledged in Scotland before persons who were not writers to the signet, no writers to the signet residing within 100 miles, and the parties being, in fact, unable to travel.

COPLEY, Serjt., moved that the acknowledgement of a fine might be taken in Scotland, before *Thomas Moir*, and *Roderick Gray*, not being writers to the signet, on an affidavit, that the Conusor, *Alexander Matthew*, and *Isabel*, his wife, lived at *Cruden*, in the county of *Aberdeen*, 100 miles from *Edinburgh*, where alone writers to the signet reside, and were, the one 70, and the other 67 years of age, and unable to travel to *Edinburgh* without great danger of their lives.

Fiat.

.1817.

CHEESMAN, Demandant; SYKES, Tenant; DENN and
ELEANOR his Wife, Vouchers.

June 23.

HEWOOD, Serjt., moved to amend a recovery by striking out the words "*Eleanor* his wife," on the ground that *Eleanor*, the wife, was a minor at the time of taking her consent under a writ of *dedimus potestatem*, of which fact the commissioners were not then conusant.

Recovery amended by striking out a minor voucher.

Fiat.

BRODIE, Plaintiff; STEVENS, Deforciant.

June 23.

LENS, Serjt., moved that certain recoveries and fines might pass as of this term, notwithstanding that the acknowledgment, which was taken in *Ireland*, had an erasure in it, upon producing an affidavit to explain that circumstance, by swearing that when the acknowledgement was taken the same words were written on the erasure which now stood thereon.

Fine permitted to pass with an erasure in the acknowledgment, upon affidavit that the words were written thereon before it was acknowledged.

Fiat.

NOBLE, Demandant.

June 25.

BEST, Serjt., moved to amend a recovery by adding more land, after 87 years, on the affidavit of the steward of the estate, stating generally, that the possession had during all that time gone along with, and pursuant to the title.

Recovery not permitted to be amended on unqualified affidavit that the possession had gone with the title for a period long before the knowledge of the deponent, not stating the grounds of his belief.

*GIBBS, C. J. Only see how dangerous a practice this is ! Although we have in many cases been obliged to conform to the precedents established by our predecessors, yet the extreme generality of this affidavit is such, in swearing to facts lying long beyond the time of the Deponent's own life, that we cannot consent to this amendment, without an affidavit stating more particularly the extent of his knowledge, and the ground of his belief.

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Rule refused.

1817.

June 23.

HOPPER and Wife v. REEVE.

It is a direct trespass to injure the person of another by driving a carriage against the carriage wherein such person is sitting, although the last-mentioned carriage be not the property nor in the possession of the person injured.

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THE Plaintiff declared that the Defendant, with force and arms, at *Portsmouth*, drove a certain gig against a certain carriage in which the Plaintiff's wife was then riding, and overturned it, and greatly hurt the Plaintiff's wife. After verdict for the Plaintiff taken at the *Winchester Lent* assizes, 1817, before *Abbott, J., Pell, Serjt.*, in *Easter* term, 1817, moved in arrest of judgement, upon the ground that this ought not to have been an action of trespass, but an action on the case, for that the declaration did not state that the carriage in which the Plaintiff's wife was riding, was the carriage of the Plaintiff, nor averred any injury to the carriage, but was solely brought for an injury to the wife. Though that injury received by the Plaintiff's wife arose out of an act of the Defendant, yet it was in consequence of the Defendant having run against the carriage of some other person, for such it must be intended to be, not being stated to be the carriage of the Plaintiff, and no act could be more consequential in its nature, than this injury to the Plaintiff's wife. The case of *Scott v. Shepherd (a)*, went beyond the law, but not so far as this. The Court granted a rule *nisi*.

Lens, Serjt., in this term showed cause. After verdict, it must be intended that the carriage was proved at the trial to be the Plaintiff's carriage, if that be necessary to the maintenance of the action of trespass. If this carriage was in the possession of the wife, it was for the time in the possession of the husband, and though it might have been ground of special demurrer, it is not a ground of general demurrer. If it were stated that she was sitting in the chaise of a stranger, it would have appeared on the evidence that it could not have been in the possession of the Plaintiff, and the objection, if any objection it be, would have arisen. But this being in arrest of judgement, it must be taken *prima facie* that the act was, as averred, done with force and violence. If the Plaintiff had declared in case, it would have been necessary to show that the chaise was in the possession of a third person, not in the possession of the Plaintiff, in which last circumstances trespass only, and not case would be proper.

Pell, in support of his rule. The objection is, that the grievance complained of, warrants case but not trespass, for the hurt

to the woman was consequential on an act of hurt to another person's carriage, *Pitts v. Gaince and Foresight* (a). The Plaintiff might have declared on his possession of this carriage, and in that case he might have declared in trespass. *Reynolds v. Clarke* (b). The driving against the carriage, was, so far as appears on this record, no trespass to the Plaintiff. The distinction is, that where the injury is immediate, the remedy is trespass, where it is consequential, there the proper remedy is case. It appears that this plaintiff had no interest in the carriage, and the damage was therefore consequential. *Leame v. Bray* (c).

GIBBS, C. J. I do not think I could point out any defect in the legal argument of either of the counsel, but the facts are not brought within the law stated by the Defendant's counsel; for I am of opinion that he who throws over a chair or a carriage, in which another person is sitting, commits a direct trespass against the person of him who is sitting in that carriage or chair, and that the action of trespass may be well maintained for it.

Rule discharged.

(a) *Str.* 635. 2 *Id.* *Raym.* 1402.

(b) 1 *Id.* *Raym.* 558.

(c) 3 *East*, 593.

1817.

HOPPER
v.
REEVE.

[700]

GRUNDY v. WILSON.

June 25.

IN replevin, four issues being joined, and notice of trial given for the last Summer assizes, the cause was referred, under a Judge's order (with liberty to either party to make it a rule of Court), to an arbitrator, who had power to award, determine, and direct respecting the several issues joined in the cause, and the costs thereof, in like manner as if the cause had been tried; and the costs of the reference and award were to be in the discretion of the arbitrator, who made an award, finding three issues for the *Plaintiff, and one for the Defendant, and that 12*l.* 16*s.* rent was due to him. The arbitrator had not directed any verdict or judgement to be entered; and the costs of the cause were taxed at 19*l.* on the rule of Court, which had been obtained, recording the submission.

Lens, Serjt., had, on a former day, obtained a rule *nisi*, that the Defendant in replevin might be at liberty to sign and enter up final judgement against the Plaintiff for 12*l.* 16*s.*, and also for the 19*l.* costs pursuant to this award, and to the prothonotary's *allocatur*.

Where a replevin cause being referred after issue joined and before jury sworn, the arbitrator found one issue for the Defendant, and awarded the payment of rent due to him, but ordered no verdict or judgement to be entered; held that the Defendant was not entitled on motion to enter up judgement in the action, for the rent and costs of the action taxed for him.

[*701]

Onslow,

1817. *Onslow*, Serjt., now showed cause. The case was referred before trial, or verdict, and the arbitrator has not directed any verdict to be entered.

GRUNDY
v.
WILSON. *Per Curiam*. It cannot by any possibility be done.
Rule discharged with costs.

June 25.

WEBB and Another v. ASPINALL.

A *cognovit* given after process sued out, and before declaration is good.

The rule requiring the presence of an attorney for the Defendant upon the giving of a warrant of attorney by a Defendant in custody, extends to *cognovits*.

[*702]

BEST, Serjt., had, on a former day, obtained a rule *nisi* to set aside a judgement, and a *cognovit* (for the debt and costs of the arrest) on which it had been entered up, on two grounds; first, that the *cognovit* being given immediately after the arrest, and before declaration, was void; for, at the time when the Defendant acknowledged the Plaintiff's cause of action, the Plaintiff had not stated on record any cause of action; secondly, that the Defendant had given this *cognovit* while he was in the custody of the officer, and that no attorney for the Defendant was present when he signed the instrument; for that the rule of (a) Court *requiring an attorney for the Defendant to be present, when he, being in custody, executes a warrant of attorney to confess judgement by equity of construction also extends to the case of a *cognovit* given by a prisoner, although the rule makes no express mention of *cognovits*.

Vaughan, Serjt., on this day showed cause, upon affidavits that when the Defendant signed the *cognovit*, he came to the Plaintiff's house, unattended by any officer, and that he did not state, nor did the Plaintiff know, that he was in custody in this or any other action. *Vaughan* contended, that, in point of law, the Defendant certainly was not then in custody; for the sheriff, in permitting him to come alone to the Plaintiff, had been guilty of permitting an escape; and, therefore, the case is not within the rule.

GIBBS, C. J. I very well know, that an opinion has prevailed that a *cognovit* cannot be taken until after declaration: but I learn from the officers of this Court, that it has been the constant practice to take *cognovits* before declaration; and that judgements have been entered on these *cognovits*; and, therefore, though I know that a contrary opinion has been cherished by certain persons, I am of opinion that the judgement is regular. The next

(a) *Hil. T.* 14 & 15 *Car. 2.* 1662.

question

question is, whether the *cognovit* is void, within the rule which requires that every warrant of attorney is to be executed in the presence of an attorney for the Defendant, if he be in custody, and that for default of this observance it shall be void. Here it is sworn by the Defendant, that he was arrested, and went to the Plaintiff, and *Webb*, the Plaintiff's attorney, to whom he gave a *cognovit* for a sum, which included 15*l.* debt, and the costs of the writ. The Plaintiff answers this, by saying, that when the Defendant came to the Plaintiff, he, the Defendant, was alone, and did not state to the Plaintiff, that he was in custody in this, or any other cause; and that he, the Plaintiff, did not know or believe that the Defendant was in custody in this or any other cause. It is very remarkable how the Plaintiff, *Webb*, swears this: he does not state how, or under what circumstances, the application was made to the Defendant for this *cognovit*; but this I know, he had sued out bailable process against the Defendant, and had directed his attorney to arrest him, and had made him give a security for the costs of the arrest. Did he then believe that the Defendant had not been arrested when he received the costs of the arrest? Whatever his idea of the meaning of the word knowledge may be, I think he could not but be assured how the facts were. This, therefore, we think, comes within the rule that a *cognovit*, given by a Defendant in custody, must be executed in presence of his attorney; and that it therefore is void, and the rule for setting aside this judgement with costs must be made (a)

1817.

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v.
ASPINALL.

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Absolute.

(a) ARNOLD v. LOWE.

BEST, Serjt., showed cause against *Paul v. Cleaver* (a), as deciding that a rule which had been obtained by *Vaughan*, Serjt., for setting aside a *cognovit*, on the ground that it was given by a Defendant in custody, and that no attorney for the Defendant was present at the execution. In support of the rule was cited the case of

Paul v. Cleaver (a), as deciding that a *cognovit* comes within the same rule of Court, which requires that on the execution of a warrant of attorney by the Defendant in custody, an attorney must be present. The Court made the

Rule absolute.

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(a) *Ante*, II. 360.

AN

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effect the purpose for which the Defendant fastened them there: none of them was less distant than 50 yards from any foot-path, and some were from 150 to 160 yards distant therefrom. The Defendant kept notices painted on boards placed at the outside of some parts of the wood, that steel-traps, spring-guns, and dog-spikes were set in that wood for vermin. The Plaintiff, with *B.*'s permission, was sporting in *B.*'s wood with a valuable pointer; a hare rose in his wood, and was pursued by the dog thereout, over the bank and ditch, into the Defendant's wood, and in the pursuit there ran against one of the sharp spikes and was killed. The Plaintiff endeavoured as much as in him lay to prevent his dog from pursuing the hare into the Defendant's wood, but was unable so to do. The Plaintiff having brought an action upon the case against the Defendant to recover a compensation for the loss of his dog, the Court of Common Pleas were equally divided in opinion whether the action was maintainable. *Gibbs, C. J.*, and *Dallas, J.*, holding that it was not, and *Park* and *Burrough, Js.*, holding that the Plaintiff was entitled to recover. *Deane v. Clayton.* Page 489

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ANNUITY.

1. If a power to redeem an annuity upon six months' notice terminating on one of the days of payment be memorialized as a power to redeem at any time on six months' notice, the misdescription is fatal. *Tringham v. Bethune.* 429
2. Where the attorney for the grantor of an annuity, at the time of the payment of the purchase-money, takes and keeps an unreasonable part thereof for the expenses of the deed, this is not a ground on which the Court will set aside the annuity. *Mootham v. How.* 596

APOTHECARY.

The house apothecary of an infirmary who officiates in mixing medicines for the patients of the charity, but for no others, is a person already in practice as an apothecary within s. 14. of the apothecary's act, and need not obtain a certificate, nor serve an apprenticeship of five years, as required by the 15th sec-

tion of the statute 55 G. 3. c. 194. *Wogan v. Soquerville.* Page 401

ARBITRATION.

1. A general reference of all disputes, differences, and demands between the Plaintiff and Defendant in an action, does not confer on the arbitrator power to award the costs of the reference. 213
2. If the party in whose favour an award is made, demand more than is due to him, he cannot have an attachment for the non-payment on that occasion of the sum which is due. *Strutt v. Rogers.* *ib.*
3. Under a submission to arbitration of two assaults (for one of which the Defendant had been indicted and convicted at the quarter sessions), and of all costs incident to the indictment and subsequent proceedings thereon, the arbitrator awarded a payment in satisfaction of all costs incident to the indictment and previous and subsequent proceedings thereon: Held, 1. That the indictment and assaults might legally be referred. 2. That the arbitrator did not thereby exceed his authority. *Baker v. Townsend.* 422
4. Where a verdict is found for the Plaintiff, subject to an award, and before award made the Defendant dies, a subsequent award of a verdict for the Defendant, and judgement thereon cannot be supported. 571
5. So, if a juror be withdrawn, and the cause referred, an award made after the Defendant's death is clearly bad. By *Gibbs, C. J.* *ib.*
6. In entering into a rule of reference at *nisi prius* with a verdict for the Plaintiff, it is prudent to provide by a special stipulation, that the reference shall not be defeated by the death of one of the parties before award made. *Toussaint v. Hartop.* *ib.*
7. But if a stranger to the cause become by rule of Court party to a reference made in the cause before any jury is sworn, and if, after the award made, but before judgement, one of the parties to the cause die, though the cause abate, the rule of Court is not defunct as to the stranger; but an attachment shall go against him thereon, for non-performance of the award. 575

8. An executor may have, without *scire facias*, or other process of revivor, an attachment for non-performance of an award made in his testator's cause in his lifetime in favour of the testator, though the suit abated by his decease. *Rogers v. Stanton.* Page 575
9. The Court will not review an award, on a suggestion that the arbitrator, to whom all matters in difference were referred, considered only the legal, and rejected the equitable questions, when the party applying does not state to the Court any equitable case, or question, which he supposes the arbitrator to have rejected. *Craven v. Craven.* 644
10. Where a replevin cause being referred after issue joined and before jury sworn, the arbitrator found one issue for the Defendant, and awarded the payment of rent due to him, but ordered no verdict or judgement to be entered; held, that the Defendant was not entitled, on motion, to enter up judgement in the action, for the rent and costs of the action taxed for him. *Grundy v. Wilson.* 700

ARREST.

And see JOINT ACTION, 2. PRIVILEGE, 1, 2, 3.

1. Second arrest for the same cause allowable where a judgement in a former action has been reversed for error. *Cartwright v. Keely.* 192
2. Upon a bond in a penalty conditioned for paying a less sum by instalments and interest, though a part only of the instalments are due, the obligee may arrest for the aggregate amount of all the instalments, and the interest accrued due before the action brought. *Talbot v. Hodson.* 251
3. The statute of 51 G. 3. c. 124. 's. 1. does not avoid the Plaintiff's proceedings and judgement, by reason of his arresting for a sum exceeding 15*l.*, and recovering a less sum than 15*l.* *Spink v. Hitchcock.* 435

ASSIGNEE OF LEASE.

See VENDOR AND PURCHASER, 2.

ATTACHMENT.

See RULE OF COURT, 1. ARBITRATION, 2.

ATTORNEY.

See VENUE, 1.

Where an attorney has in his custody muniments of two co-defendants, the Court will not refer it to the prothonotary, to ascertain which of them he shall deliver over to the one Defendant, who pays the debt and costs. *Duncan, Gent. v. Richmond.* Page 391

ATTORNEY, WARRANT OF.

See WARRANT OF ATTORNEY. JOINT ACTION, 1. FINES AND RECOVERIES, AMENDMENT OF.

AUCTIONEER.

1. If an auctioneer sells goods and delivers them without giving notice of any lien or claim which he has on the owner, and the buyer settles for the goods with the owner without such notice, the auctioneer cannot sue the buyer for the price of the goods. 237
2. So, if the auctioneer sells the goods of B. as the goods of A., and the buyer, without notice, takes the goods with the auctioneer's assent, and pays the price of them to A., the auctioneer cannot afterwards maintain an action for the price. *ib.*
3. No implied contract to pay arises on the auctioneer's giving up his lien by delivery of the goods. *Coppin v. Walker.* *ib.*
4. Where an auctioneer had sold goods, and delivered them without payment, held that as he had parted with his lien, the Defendant might, in an action by the auctioneer, set off against the price a debt due to him from the owner of the goods. 243
5. And where the auctioneer had sold to the Defendant the goods of A. in a sale of the goods of B., held that this was such a fraud that the Defendant might set off a debt due to him from B. against the price of the goods of A. *Coppin v. Craig.* *ib.*
6. Where the purchaser at an auction of a reversionary interest in bank stock, upon failure of the vendor to deduce a title had recovered back the deposit in an action against the auctioneer, held that he might nevertheless recover interest on

on the deposit in an action against the vendor for not completing his contract, under an averment of special damage in the Plaintiff's losing, by reason of the non-performance, the interest and benefit of his money. *Farquhar v. Farley.* Page 592

AUTHORITY.

1. The pawnee of coffees, lodged in the *West India Docks*, and entered there in the pawnee's name, gave up to the pawnor, certain delivery notes thereof called Dock-warrants, having indorsed them with an order for the delivery of the goods to —, in exchange, not for cash, which he might have had, but for a check for the debt on the pawnor's banker, which check was dishonoured: the pawnor having contracted to sell the goods to the Plaintiffs, received payment for them, and gave to them the delivery notes, with a blank above the Defendant's signature, for the name of the person to whom they were to be delivered. Held, 1. That the Defendant having entrusted the pawnor with his signature to a blank, purporting to authorize the delivery of the goods, and enabled him thereby to induce faith to a contract for the sale of the goods, and to obtain payment for them from the Plaintiff; it must be considered that the contract of sale was the Defendant's contract, and the payment, a payment to the Defendant.
2. The Court (*Park, J., dissentiente*) guarded against any inference that, according to a practice which has obtained since the erection of the *West India Docks*, an indorsement on these delivery notes or dock-warrants was, of itself, and without making the wharfingers parties to the order, capable of transferring any property in the goods therein described. *Zwinger v. Samuda.* 265
3. A party conveying to trustees an estate in land, connected with an intricate establishment, which, after the conveyance, he continues to manage without their interference, held to have authority from the trustees to bind them and the land by all acts in the ordinary management of the establishment. *Taylor v. Waters.* 374

B.

BAIL.

- I. *Of the Arrest and the Bail.*
- II. *Proceedings against the Bail or the Sheriff.*
- III. *Surrender of the Principal.*
- IV. *Discharge by other Means.*
- V. *Writ of Error.*

And see SUMERDEAS.

I.

1. The Defendant's bail were permitted to appear by their own attorney and justify, where the Defendant's attorney refused to instruct counsel to move for them to justify. *Hagget v. Argent.* Page 47
2. It is not necessary for persons justifying bail by affidavit in several actions about the same time, to specify in either affidavit the relative order in which they are sworn, and that among their debts they include their liability as bail in the other actions. *Reid v. Comfoot. Same v. Ellis.* 324

II.

Bail are not liable on their recognizance for any cause of action which is not stated in the affidavit whereon the Defendant is holden to bail. *Wheelewright v. Jutting, Bail of Fles.* 304

IV.

1. Bail discharged by the Plaintiff taking from the Defendant bills of exchange, to which a surety is party, for payment by instalments. *Willison v. Whitaker.* 53
2. A Plaintiff having obtained bail to his action, sued in equity for the same cause, and being put to his election by the Court of equity, elected to proceed there, and a perpetual injunction went, not to proceed at law: Held that this was no ground for discharging the recognizance of the bail. *Horsley v. Walstab.* 235
3. If a Plaintiff swears positively to a bailable cause of action, the Court will not try upon affidavits whether the transaction be such an one whereon no legal debt can arise. *ib.*

4. The Court will not relieve the bail of a bankrupt who are fixed between the signature of the bankrupt's certificate by his creditors and the commissioners, and the time of the allowance of the certificate by the Lord Chancellor. *Stapleton v. Macbar.* Page 589

BANKER.

See LIEN, 2.

BANKRUPT.

- I. *Of the Bankruptcy and Commission.*
 II. *Of the Bankrupt's Rights and Duties.*
 III. *Of the Bankrupt's Estate.*

I.

1. A commission of bankrupt may be supported on a debt due to the petitioning creditor in the character of testator, although he have not obtained a legal probate at the time when the commission issued, if he afterwards obtains a valid probate, which makes the debt good, and has relation back to the testator's death. *Rogers and Another v. James.* 147

2. If the assignees of a bankrupt intermeddle with and assume the management of a farm, this is a sufficient election to take to the term, and makes them liable to the landlord, in consideration of their tenancy, for all mismanagement. *Thomas v. Pemberton and Ketteridge.* 206

3. A person who buys any article for the purpose of mixing it with his own produce, with a view to sell the mixture more advantageously than his own produce could be sold unmixed, does not thereby become a trader. 405

4. A person who buys pigs or other stock with a view to a re-sale of them, as ancillary to the profitable occupation of his farm, and in the interval feeds them wholly or principally on the produce of his farm, does not thereby become a trader. 409

5. A farmer bought ray-grass-seed, mixed it with seed of his own growth, and sold the mixture. He bought pigs, put them on his farm, fed them on the stubbles, and resold them, some after a week, some after longer periods: Held that neither of these was an act of trading.

Patten and Another, Assignees of Gould a Bankrupt v. Browne. Page 409

6. If the assignees of a bankrupt, suing the petitioning creditor for money of the bankrupt's which he has got into his hands accidentally, show that, on a statement of accounts between the Defendant and the bankrupt, the balance due from the latter is less than sufficient to sustain the commission, the Defendant nevertheless is estopped from taking advantage of that fact to defeat the action, by his affidavit of debt, made to support the commission. *Harmer and Another, Assignees of Edward Davis, v. Gilbert Davis.* 577

II.

1. *Semble*, that a bankrupt's certificate has no relation back to any earlier period than the Lord Chancellor's allowance thereof. *Stapleton v. Macbar.* 589
2. Where three of five joint contractors had pleaded that after the promises and cause of action they became bankrupts and the Plaintiffs proved their debt under the commission, and elected to take the benefit thereof, and issue joined on the proof under the commission, a question arising whether the other two Defendants had continued partners to the time of the contract, though the evidence on the issue on the bankrupt's plea is for them, they are not entitled to a verdict in the midst of the cause, that they may be called as witnesses for the other Defendants. 599
3. Especially if the Defendants call witnesses. *Emmet and Another, v. Butler and Others.* *ib.*

III.

1. Where a bankrupt sued for the benefit of his assignees, the Court refused to grant a new trial, unless his assignees would abide by the verdict and become responsible for the costs. *Noble v. Adams.* 59
2. If a carrier, after notice from the vendor of goods to stop them *in transitu*, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee.
3. And though, the vendee having become a bankrupt

a bankrupt, the goods have passed into the hands of his assignees, yet, inasmuch as they did not come to the possession of the bankrupt with the consent of the true owner, they are not in the order and disposition of the bankrupt within the statute 21 Jac. 1. c. 19. s. 11. *Litt and Another v. Cowley and Others.* Page 169

4. A creditor to whom a trader had long promised payment by bills on debtors to himself, did, under a threat of arrest, after an act of bankruptcy unknown to the creditor, but with the creditor's knowledge that he the trader must stop payment, sign bills on his debtors in favour of the creditor, on stamped paper produced by the creditor: Held that the assignees of the creditor could not bring trover for these bills. *Walker and Another, Assignees of Dunn. v. Laing.* 568

BARON AND FEME.

See FEME COVERT. MONEY LENT, 1.

BARRATRY.

See SHIP.

BATTERY.

See COSTS. V. 4.

BILLS OF EXCHANGE, AND PROMISSORY NOTES,

And see AFFIDAVIT TO HOLD TO BAIL, 1, 2.

1. An agent purchasing foreign bills for his principal, and indorsing them to him, without qualification, is liable to the principal on his indorsement, however small be the commission which he gets upon the purchase. 159
2. It is no laches to put into circulation before acceptance a foreign bill payable after sight, and to keep it circulating without acceptance so long as the convenience of the successive holders requires. *Goupy and Another v. Harden and Others.* *ib.*
3. If a buyer pays for goods by a bill which the drawee refuses to accept, and afterwards desires it may be again presented, and it will be honoured, the holder is not bound again to present it. 319

4. Nor to return the bill. Page 312
5. Whether the seller of goods, suing for the price, and producing the Defendant's bill for the price protested for non-acceptance, is bound to prove that it was duly presented for acceptance and refused, *quare. Hickling and Another v. Hardey.* *ib.*
6. A, an acceptor of a bill payable at his London bankers', remitted funds to pay it, or, take it up if over-due; which last being the case, the bankers, who were bankers in London, called on the holders, intending to take it up; but finding the bill was sent back to Ireland as dishonoured, they remitted the money back to the acceptor, and upon a subsequent presentment of the bill, refused payment: Held that this was not such a specific appropriation of the money, as to render the bankers liable to the holder for the amount remitted. *Stewart v. Fry.* 339
7. The holder of an inland bill, payable after sight, is not bound instantly to transmit the bill for acceptance. 393
8. He may put it into circulation; or
9. Though he do not circulate it, he may take a reasonable time to present it for acceptance. *ib.*
10. What is a reasonable time is always a question to be determined by a jury. *ib.*
11. A delay to present until the fourth day a bill on London, given within twenty miles thereof, is not unreasonable. *Fry v. Hill.* 397
12. The acceptance of a bill drawn by procuration, admits the drawer's handwriting, and the procuration to draw. 455
13. But though the bill is indorsed by the same procuration, the date thereof not appearing, the acceptance does not admit the procuration to indorse. *ib.*
14. So, though the indorsement were made before the acceptance. By *Park, J., Robinson v. Yarrow.* *ib.*

BOND.

See AFFIDAVIT TO HOLD TO BAIL. 3, 4.
REPLEVIN BOND. MARRIAGE ARTICLES.

Upon a bond in a penalty conditioned for paying a less sum by instalments and interest, though a part only of the instalments

ments are due, the obligee may arrest for the aggregate amount of all the instalments, and the interest accrued due before the action brought. *Talbot v. Hodson.* Page 251

BROKER.

A broker of the city of *London* may recover the price of sugars, which he, being employed to purchase, has bought in his own name; and it is not a breach of his bond given for duly performing his office as broker. *Kemble and Others v. Atkins and Another.* 260

BUILDING-ACT.

See PARTY-WALL.

C.

CARRIER.

See STOPPAGE IN TRANSITU, 1, 2.

CASES — *observed on, questioned, explained, or over-ruled.*

<i>Hargr. Co. Litt. 20 b. note 2. (Lord Hale's MS.)</i>	92
<i>Hotham v. East-India Company. (Doug. 272.)</i>	665
<i>Jackson v. Yates (7 East, 94.)</i>	172
<i>Parish v. Crawford, (2 Str. 1252.)</i>	24
<i>Peacock, Rules and Orders, C. B.</i>	176
<i>Smith v. Smith (Str. 955.)</i>	231
<i>Wienholt v. Roberts (2 Campb. 586.)</i>	480

CERTIFICATE.

See BANKRUPT, II. 1.

CESTUI QUE TRUST.

Whether a grant by *cestui que trust* can have any operation to convey an interest in the land. *Moore v. Earl of Plymouth.* 614

CHARTER-PARTY.

And see COVENANT, 4. SHIP, 1, 2, 3.

1. Where a practice prevailed of compressing bales of cotton wool by machinery, to improve their stowage, the furnishing a cargo of cotton wool in uncom-

COPYHOLD.

pressed bales, as they came from the grower, was held not to be a compliance with a contract to load a full and complete cargo. Page 272

2. Where the freighter had an option to load a whole ship with one species of goods at a higher rate of freight, or a part with goods at a higher rate, and a part with another species of goods at a lower rate, but the latter, if laden at all, required to be first laden on board, the freighter, by beginning to load with the goods at the higher rate, was deemed to elect to furnish an entire cargo of those goods at the higher rate, and having so elected, but failing to load a complete cargo thereof, held that the jury were warranted in giving damages for the entire complement at the higher rate, without regarding the liberty he once had to load goods at a lower rate. *Benson v. Schneider.* 272

COGNOVIT.

See PRACTICE, VII. 2, 3.

COMMISSION DEL CREDERE,

And see INSURANCE, VI. 1.

The vendor of goods through the medium of a broker who has a commission *del credere*, cannot recover the price from the broker in a declaration upon an *indebitatus assumpsit* for goods by the Plaintiff to the Defendant delivered to be sold, and by him sold. *Gull v. Comber.* 558

CONDITION.

Seemle, that a condition cannot be released upon condition. Per *Gibbs, C. J. Mason v. Corder.* 9

CONTEMPT.

See ARBITRATION, 1, 6. ATTACHMENT. SEALER OF WRITS.

CONVEYANCE.

See DEED.

COPYHOLD.

Concurrent customs in a manor to bar entails of copyhold by recovery, and by surrender,

surrender, are not inconsistent; and slight evidence suffices to prove the latter, because it is adverse to the interest of those who make the evidence. *Doe, on Demise of Dauncey, v. Dauncey.*

Page 674

CORPORATION.

The mayor, jurats, and commonalty of the ancient town of *Rye*, were held to take lands by a devise to the Right Worshipful the Mayor, Jurats, and Town Council of the ancient town of *Rye*. *The Attorney-General, at the relation of Clarke and Another, v. The Mayor, Jurats, and Commonalty of the ancient Town of Rye and Others.*

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CORPORATOR.

See PRIVILEGE.

COSTS.

- I. *When payable by and to persons in general.*
- II. *When payable by and to particular Persons.*
- III. *Of staying Proceedings till Costs paid, or Security given.*
- IV. *Set off.*
- V. *What Costs are payable.*

I.

And see FEIGNED ISSUE, I.

III.

If one Plaintiff be in this country and liable for costs, though another is resident abroad, the Court will not compel him to give security for the costs. *Anonymous.*

307

V.

And see EXECUTION, 7. ARBITRATION, 2.

1. Though a witness, subpoenaed by both parties, obtain from each, without the knowledge of the other, full payment for his expenses and loss of time, the party succeeding is entitled to have his payment to the witness allowed him in his taxed costs of suit. 337
2. And that, although he made his pay-

ment after the witness had been already paid by the other party. *Benson v. Schneider.*

Page 337

3. If a Defendant, moving for Judgement as in case of a nonsuit for not proceeding to trial, omits to obtain in the disposal of that rule his costs for not proceeding to trial, he cannot, after that rule is discharged, obtain a separate rule for those costs. *Lingham v. Langhorn.*

476

4. Where in an action for assaulting and ill-treating, the Defendant, as to the assaulting and ill-treating, justified turning the Plaintiff out of his house, but the issue on the justification was found against him: the Court held, that upon the whole justification a battery appeared admitted, and the excuse not being proved, the Plaintiff was entitled to full costs, without a judge's certificate. *Johnson v. Northwood.*

689

COVENANT.

And see CHARTER-PARTY.

1. A covenant to repair at all times, when, where, and as often as occasion should require during the term, and at furthest, within three months after notice of want of reparation. This is one covenant; and it cannot be stated as an absolute covenant to repair at all times when, where, and as often as occasion shall require during the term. *Horsfall v. Testar.*
2. A lessee covenanted, within the two first years of the term, to put the premises in good and sufficient repair, and at all times during the term to repair, pave, scour, cleanse, empty, and keep the messuages, ground, and other the premises, when, where, and as often as need should require; and within the first fifty years of the term, to take down four messuages, as occasion might require, and in the place thereof erect upon the demised premises four other good and substantial brick messuages: breach, that although fifty years of the term had expired, the lessee did not, within the fifty years, take down the four messuages, and in the place thereof erect four other good substantial brick messuages. Plea, That occasion did not require,

require, within the fifty years, that the four messuages should be taken down. Upon demurrer, the Court intimated an opinion, that if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the covenant would be satisfied, without taking down the old houses. *Evelyn and Wife v. Raddish and Others.* Page 411

3. A covenant to rebuild a house in two years, and sufficiently to repair the same and all other buildings to be erected during the term, when, where, and as occasion should require, and the same, in all things sufficiently repaired, in the end of the term to yield up to the lessor, was followed by a covenant that the lessor might, twice or oftener in a year, enter to view the condition of the premises, and of all want of reparations leave notice in writing to repair within six months, within which time the lessee covenanted to repair accordingly: Held that the first covenant is not so qualified by the last, but that the Plaintiff may declare on the leaving the premises out of repair at the end of the term without averring or proving six months' notice to repair. *Wood v. Day.* 646

4. The Plaintiff covenanted that his ship should receive from the freighter's agent at *Gibraltar*, or at *Malaga, Seville*, or *Cadiz*, as should be ordered by the freighter's agent at *Gibraltar*, a homeward cargo, and therewith sail direct to *London*, and there make true delivery of it; and the freighter covenanted to pay for the freight of the vessel for the voyage out and home 550*l.*, viz. 200*l.* on clearing outwards, 100*l.* at *Gibraltar*, one moiety of the residue in cash on the delivery of the homeward cargo in *London*, and the other moiety by a bill at two months from the completion of the said delivery. The plaintiff in pursuance of directions from the freighter's agent at *Gibraltar*, sailed to *Cadiz* for a cargo, the freighter's agent at *Cadiz* directed him to go to *Seville* for a cargo; the freighter's agent at *Seville* loaded a homeward cargo, and directed him to proceed to *Liverpool*, where he delivered, and the freighter received the cargo. Held that the Plaintiff could not; in an action of covenant on the charter-party,

averring the substituted voyage, recover the freight covenanted to be paid on the delivery in *London.* *Thompson v. Brown.* Page-656

COUNTY PALATINE.

See VENUE, 5.

COURT OF CHANCERY.

1. Cases out of Chancery to be argued in this Court cannot be set down nor heard, unless they are signed by a Serjeant. *Nanfan v. Legh.* 85
2. Whatever number of parties there may be to a suit in equity, out of which a case is directed for this Court, the Court will hear only one counsel on behalf of each separate interest. *Bettison and Another v. Rickards and Another.* 105

COURT OF COMMON PLEAS.

By the words "the said Court of the Bench," in a plea, the Court of Common Pleas shall be intended. *Mill v. Pollon.* 271

CUSTOM.

See COPYHOLD.

D.

DAMAGES, MEASURE OF.

1. Upon a contract to replace stock, and pay dividends in the mean time, though the jury give damages for the value of the stock, and the amount of the dividends, yet, upon affirmance in error of the judgement, the measure of increase is not the further dividends that may have accrued, but interest on the damages given as the value of the capital stock. *Dwyer v. Gurry and Others.* 14
2. If the buyer of a horse with warranty, relying thereon, resells him with warranty, and being sued thereon by his vendee, offers the defence to his vendor, who gives no directions as to the action, the Plaintiff, defending that action, is entitled to recover the costs thereof from his vendor, as part of the damage occasioned by his breach of warranty. *Lewis v. Peake.* 153

DEATH.

DEATH.

Thomson, the Right Hon. Sir *Alexander*,
Knt. C. B. of Exchequer. Page 389

DEED.

See FINES AND RECOVERIES, AMENDMENT
OF, I, 7.

DEFEAZANCE.

See WARRANT OF ATTORNEY.

DEMURRER.

Upon demurrer, if each party takes objections to the pleadings of the other, it is the duty of each to deliver paper-books, with the points intended to moot on both sides, stated in the margin.
Clarke v. Davis. 72

DEVISE.

- I. *By what Words Lands, &c. pass.*
- II. *What Estate.*
- III. *Revocation.*

I.

1. Bequest of "all my stock in trade, household goods, wearing apparel, ready money, securities for money, and every other thing my property of what nature or kind soever, to and for her own proper use and disposal:" Held not to carry land, being controlled by indications which rendered the testatrix's intent uncertain. 79
2. But if the testatrix's intent had clearly appeared, these words are sufficient to carry land. *Doe, on the Demise of Bunny, v. Rout* 79
3. The testator devised that his executrix should borrow as much as was necessary to satisfy all demands, and repay it out of the money arising from rents during the minority of his two children, *Ann* and *George*: he bequeathed all his property, both real and personal, to be divided equally between his two children, allowing that his son *George* should take, as a part of his share, the testator's farm at *B.*, excepting the house and land which he bought of his father's trustees at *B.*, together with the furniture there-

of, he left to them in common, and to the longest liver in fee-simple, and that his children should be put into their respective shares of the rent received during their minority, as well as their shares of landed property, when they should attain their respective ages of twenty-one years. *Ann* died living the testator: Held that the son *George* took all the testator's property, both real and personal, and all his estate and interest therein. *Smith v. Horlock and Others.* Page 129

4. Devise of my messuage, farm, and lands, called *C. farm*, situate in or near the parishes of *D. W.*, and *T.*, now on lease to *R.*, at the yearly rent of 150*l.* A close in the parish of *D.*, heretofore arable, and part of *C.* farm, and then occupied with it by the lessee thereof, but for thirty-three years past sown with acorns, and occupied by the owner, and excepted out of two leases of *C. farm*, one prior, the other posterior to the date of the devise, passes by the devise as parcel of *C. farm.* *Down and Another v. Down.* 343
5. "I devise all my freehold and copyhold estates situated in or near *Latchingdon* near *Maldon*; and also all and singular my freehold and copyhold estates at or near *Palepit* in the same county, which last-mentioned estates are now or lately were in the occupation of *Lawrence Parley* and——*Thomas*, widow." The testatrix had a freehold close in the parish of *St. Peter's, Maldon*, near to a principal street of *Maldon*, distant from three and a half to six and a half miles from her principal estate at *Latchingdon*, and intercepted from it by parts of three parishes. She had a freehold close in *Steeple*, distant two and a half miles from *Latchingdon*, and nine from *Maldon*. She had copyhold lands in *Latchingdon*, and the will of an ancestor spoke of lands both freehold and copyhold in *Latchingdon*: Held that the freehold close in *St. Peter's, Maldon*, did not pass by this devise. *Doe, on Demise of Dell, v. Pigott.* 553

II.

1. A devise of "all my estate real and personal whatsoever, that is to say, my land, houses, and all other buildings situate

- situate at S. on my estate, and likewise all my household furniture and stock in trade," carries a fee in the lands at S. *Denn, on the Demise of Richardson, v. Hood and Others.* Page 35
2. Devise to testator's wife of his cottage for life, if she continued chaste and unmarried; but immediately after her death or marriage, to his son *Joseph Hulse*, as soon as he should attain twenty-one, and to his heirs for ever. Devise of his land and estate in fee-simple, where he then lived (except what was thereinbefore bequeathed to his wife) to his son *Joseph Hulse*, as soon as he should attain twenty-one, and to his heirs lawfully begotten for ever, subject to an annuity of 7l. to his wife: Held that *Joseph Hulse* took an estate-tail in the land and estate in fee-simple where the testator lived. *Nanfan and Wife v. Legh.* 85
3. Sir G. P. being possessed of an estate *pur auter vie*, and seised of lands in fee, in the counties of D. and N., and of equitable and legal estates for life in lands in seven other counties, with remainder to his first and other sons in tail male, with remainder to himself in fee, and being possessed of a long leasehold, and entitled for his life to the dividends of certain trust money, with remainder to his children absolutely, and possessed of other personal effects, devised the estate *pur auter vie*, to *E. Lester* for life; remainder to *R. S.* absolutely. He devised all other his estates, real and personal, wheresoever situate, which he was possessed of or entitled to, and of which he had power to dispose, to *E. Lester*, her heirs, executors, &c. In case the testator's son should die without issue, he devised all his real estates, not therein before disposed, situate in all the nine counties named, and all testator's personal property in any of the public stocks or funds, to *E. Lester* for life; remainder to *R. S.* in fee: Held that *E. Lester* took an estate in fee in the testator's fee-simple lands in the counties of D. and N. *Bettison and Another v. Rickards.* 105
4. Devise of all the residue of what the testator should die possessed of, or in expectancy of what nature or kind soever, in *Jamaica* or any other country, to his wife *E. Sanders*, for her natural

life, reserving to her full power to will away any part or proportion of his said residuum at her decease; and after that period he bequeathed the residue of what was undisposed of by his wife, to his daughter, and the heirs of her body for ever: Held that the wife had a power of appointment over the whole residuary estate. *Cook and Wife v. Farrand and others.* Page 122

5. Devise of land to the testator's son *T. G. Smith* for life, and, after his decease, to the use of all the children of the body of his said son lawfully issuing (but exclusive of his eldest son, in case of there being two or more such children besides him), their heirs and assigns for ever, as tenants in common; but in case his said son should depart this life without leaving any lawfully-begotten child or children, or issue of any such child or children, then, after his decease, to the use of the testator's daughters in fee. *T. G. Smith* suffered a recovery, and devised: Held that *T. G. Smith* had, at the time of devising, only an estate for life. *Smith v. Horlock and Others.* 129
6. Devise to *F. G.* and his assigns for his life, and immediately after his decease, unto the heirs of his body, lawfully to be begotten, in such parts and shares as *F. G.* should, by will or deed, appoint; and in default of such heirs of his body, then immediately after his decease, over to *J. G.*: Held that *F. G.* took an estate-tail by implication. *Doe, on the Demise of Cole, v. Goldsmith.* 209
7. Devise of gavel-kind land to the testator's three nephews, sons of his brother *John*, during their lives, in common, and after their respective decease, the part and share of him or them so dying, unto the heirs lawfully issuing of his and their body and bodies respectively, and if more than one, equally to be divided, as tenants in common, and if but one, to such only one, and to his, her, or their heirs; and if any of his nephews should die without such issue, or, leaving any such, they all should die without attaining twenty-one, then the share of him and them so dying, unto the survivor and survivors of his said nephews, and the heirs of the body of such surviving and other nephew, equally, in common. And for want, or in default of such issue of

of his nephews, unto his own right heirs. One moiety of the reversion in fee descended, upon the testator's decease, to the father of the three nephews, being one of the testator's two heirs, in gavelkind, and from him to the three nephews: Held, 1. That this was not an executory devise, but a contingent remainder with a double aspect; 2. That by the descent of a portion of the reversion in fee, the nephews' particular estate was merged therein, and the contingent remainders, which were supported thereby, were, as to that portion, also destroyed. *Crump, on the Demise of Woolley, v. Norwood.* Page 362

DISTRESS.

See REPLEVIN. REPLEVIN BOND.

DOGS.

See ACTION ON THE CASE, 3.

DONATIO MORTIS CAUSA.

A person supposing himself in *extremis* caused India bonds, Bank notes, and guineas to be brought out of his iron chest, and laid on his bed; he then caused them to be sealed up in three parcels, and the amount of the contents to be written on them with the words "for Mrs. and Miss C.," the Plaintiffs; he then directed the brother of Miss C. to replace them in the iron chest, the chest to be locked, the keys to be sealed up, and directed "to be delivered to J." (his solicitor and one of his executors) after his decease, and replaced in his own custody near his bed, and he afterwards spoke of this property as given to the Plaintiffs: Held this was not a *donatio mortis causa*, for want of a sufficient delivery, and continuing possession. *Bunn and Another v. Markham and Others.* 224

E.

EJECTMENT.

The Plaintiff in error in ejectment is not bound to give the Defendant in error notice of his entering into the re-

cognizance pursuant to 16 & 17 Car. 2. c. 8. s. 3. to pay costs on affirmance. Page 427

2. The practice has been to take a recognizance in double the annual rent of the premises, when that can be ascertained. *ib.*
3. The Plaintiff in error in ejectment is not required to find bail to join in his recognizance to pay costs on affirmance. *Doe, on the Demise of Webb, v. Goundry.* *ib.*

ELECTION.

See BANKRUPT, III. 2. BAIL, IV. 3. CHARTER-PARTY, 2.

ENEMY.

See ALIEN ENEMY.

ENTAIL.

See TENEMENT.

EQUITABLE TITLE.

See CESTUI QUE TRUST.

ERROR.

See EJECTMENT, I. VENUE, 5.

A threat of bringing a writ of error for delay, uttered six months before the writ of error sued out, held not sufficient to entitle the Plaintiff below to execution pending the writ of error. *Redford v. Garrod.* 537

ESCAPE.

See SHERIFF.

ESTATE TAIL.

See DEVISE, II. 2. 6.

EVIDENCE.

- I. Of the Competency of the Witness.
- II. Of the Evidence of particular Facts or Averments.
- III. Of Stamps.
- IV. Secondary Evidence, when admissible.

I.

1. Where three of five joint contractors had pleaded that after the promises and cause of action they became bankrupts, and

and the Plaintiffs proved their debt under the commission, and elected to take the benefit thereof, and issde joined on the proof under the commission, a question arising whether the other two Defendants had continued partners to the time of the contract, though the evidence on the issue on the bankrupt's plea is for them, they are not entitled to a verdict in the midst of the cause, that they may be called as witnesses for the other Defendants. *Page 599*

2. Especially if the Defendants call witnesses. *Emmett v. Butler.* *ib.*

II.

And see GOODS SOLD AND DELIVERED, 3. INTEREST OF MONEY, 4. PAYMENT INTO COURT, 1.

- I. An examined copy of a writ returned and filed, and of the indorsement thereon, on which writ is indorsed, apparently by the sheriff's authority, the name of the bailiff employed to make the levy, is no evidence to prove who was the bailiff so employed by the sheriff, unless evidence be added that the indorsement of the bailiff's name on the writ itself was made by the sheriff's authority. *Hill v. The Sheriff of Middlesex.* 8
2. *Prima facie* the presumption is, that a strip of land lying between a highway and the adjoining inclosure, is, as well as the soil of the highway, *ad medium flum via*, the property of the owner of the inclosure. 39
3. But if the strip of land communicate with open commons or other larger portions of land, the presumption is either done away or considerably narrowed, for the evidence of ownership which applies to the larger portions applies also to the narrow strip which communicates with them. *Grose v. West and Others.* *ib.*
4. Proof that a party signed a deed, which bears on the face of it a declaration that the deed was sealed by the party, is evidence to be left to a jury that the party sealed and delivered the deed. 251
5. The attesting witness to a bond wrote the attestation without seeing the obligor execute; another person gave evidence that the obligor signed the bond, but did not seal or deliver it: Held, that the

signing the bond, which purported to be sealed with the obligor's seal, was evidence to be left to the jury of the sealing and delivery, and that they, disbelieving the second witness, had properly found for the Defendant. *Talbot v. Hodson.* *Page 251*

IV.

If an attesting witness to a deed deny having seen the deed executed, other evidence of the execution is admissible. *Talbot v. Hodson.* *ib.*

EXECUTION.

1. A Defendant, whose goods have been taken under a *feri facias*, is entitled to call on the sheriff to return the writ, whether the goods have been sold to another, or redeemed by himself. *Edmunds v. Watson.* 5
2. If a creditor, who detains a Defendant in custody, pays any part of his weekly allowance in a spurious or foreign coin, as e.g. a French sixpence, the Defendant is entitled to his discharge. 7
3. The turnkey of a prison is not such an agent for a prisoner confined in execution, that by his acceptance of spurious coin in part of the prisoner's allowance, he can bind the prisoner. *Aguiter v. Wilson.* 7
4. Though a sheriff make a warrant and seizure of goods under a *feri facias* last delivered to him, yet the Plaintiff in a *feri facias* first delivered to the sheriff is entitled to be first satisfied out of the fruits of that seizure. 56
5. If a second *feri facias* be delivered to a sheriff after he has the Defendant's goods in possession under the prior *feri facias* of another, the goods are bound by the second execution, subject to the first execution, from the date of the delivery of the last writ to the sheriff. *ib.*
6. And that, without warrant on the second writ or further seizure. *Jones v. Atherton.* *ib.*
7. The statute 43 G. 3. c. 46. s. 5. does not enable a Defendant to levy the costs of an execution for his costs of an action. *Baker v. Sydee.* 179

EXECUTION OF POWER.

See POWER.

EXECUTOR.

EXECUTOR.

See BANKRUPT, I. 1.

1. *S. H.* devised a term to his nephew *S. H.* for life, with remainder over, with a leasing power for twenty-one years, and made *S. H.* and two others executors. *S. H.* entered, and was possessed, and alone demised the premises for forty-two years, reserving rent to himself, his executors, &c.: Held that neither his entry on the land, nor his sole lease reserving rent to himself and his executors, which was alike inconsistent with his interest as tenant for life, and his duty as executor, should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as executor. *Doe, on the Demise of Hayes and Others, v. Sturges.* Page 217
2. A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action in *assumpsit* against the executor. 580
3. And in such action, it is neither necessary to aver assets, *ib.*
4. Nor a promise by the executor; by three, *Burrough, J., dissente.* *ib.*
5. On a count averring an account stated by the Defendant of monies due from him as executor, the judgement shall be *de bonis testatoris.* *ib.*
6. It may be therefore joined with counts on promises of the testator. *Powell v. Graham, Executor of Graham.* 580

F.

FACTOR.

- A. consigned goods for sale to a house in *Hamburgh*, in which the Defendant was partner, and the Defendant made advances of money in *London* to A., to be repaid out of the proceeds of the sales. The house at *Hamburgh* purchased with the proceeds bills on *London*; they specially indorsed and remitted them to the Defendant here, and advised A. that they were bought for his account, and debited him therewith. The bills being dishonoured, a jury found that the con-

signees were not authorised to purchase bills for the account and risk of A.: and the Court held the verdict to be right. *Lucas and Others, Assignees of Doorman, a Bankrupt, v. Groning.* Page 164

FEIGNED ISSUE.

The costs in a feigned issue under an inclosure act which contains no special direction as to costs, abide the event, by the statute of *Gloucester*, as in other actions of *assumpsit.* *Earl Fitzwilliam v. Maxwell.* 31

FELONY.

See HUNDRED. PLEADER, V. 2.

FEME COVERT.

1. If a feme covert issue a bill of exchange, she may be arrested as a feme sole. 55
2. A feme covert applying to be discharged from arrest, must apply on her own personal oath of the fact of coverture, and not upon the affidavit of another. *Jones v. Lewis.* *ib.*

FINES AND RECOVERIES, AMENDMENT OF.

1. Fine amended by a lost deed to lead the uses, upon inspection of the draft, and of a certified copy of the memorial of the deed [the land being in a register-county], and on affidavit that the deed contained the amendment, and of the intent. *Frost v. Hale.* 79
2. The Court refused to amend a recovery by adding two parishes in unqualified terms after a large enumeration of lands, where the purpose of the amendment was only to include certain parcels of one out of many enumerated manors, which parcels were in the omitted parishes. *Charter, Demandant; Shepherd, Tenant; Gwynn, Vouchee.* 177
3. Where certain farms had been enjoyed by the tenant in tail and his ancestors beyond memory as tithe-free, but no legal reason for their discharge was known, to account for the enjoyment, the Court permitted a recovery to be amended by insertion of the tithes. *Cullum, Demandant; Ryder, Tenant; Vernon, Vouchee.* 341
4. Where a deed to make a tenant to the precipice

precipe conveyed tithes of corn, grain, and hay in *F. and G.*, and all other hereditaments of the recoveror within the county, and the recovery was of title of corn, grain, and hay only, the Court permitted an amendment by adding all manner of tithes in *T.*, the recoveror being seised thereof, and intending they should pass. *Page 352*

5. Where one purchaser under a recovery had obtained an amendment of the recovery, so worded, that by its collocation on the record, it destroyed and rendered insensible the title of another purchaser under the recovery, the Court, upon motion of the latter, rectified the mistake. *352*
6. Remainder-man in tail heard to show cause against the amendment of a recovery. *Lancaster, Demandant; Wilmot, Tenant; Boone, Vouchee. ib.*
7. The caption of the warrant of attorney in a recovery is not so conclusively a part of the deed of the party, but that it may after execution be amended by the writ of entry. *John James, junior, Demandant; Williams, Tenant; Maria James, Vouchee. 434*
8. Recovery amended by striking out a minor vouchee. *Cheesman, Demandant; Sykes, Tenant; Denn and Eleanor his Wife, Vouchers. 697*
9. Recovery not permitted to be amended on unqualified affidavit that the possession had gone with the title for a period long before the knowledge of the deponent, not stating the grounds of his belief. *Noble, Demandant. ib.*

FINES AND RECOVERIES, PRACTICE OF PASSING.

1. Fine permitted to pass with an erasure in the acknowledgement, upon affidavit that the words were written thereon before it was acknowledged. *Brodie, Plaintiff; Stevens, Deforciant. 697*
2. Fine in *Scotland* permitted to be acknowledged before persons who were not writers to the signet, no writers to the signet residing within 100 miles, and the parties being, in fact, unable to travel. *Matthew and Wife, Consors. 696*

FIXTURES.

See GOODS SOLD AND DELIVERED, 1.

GAME.

FRAUD.

Upon a very strong case of fraud, not otherwise, this Court will control the legal power of a Co-plaintiff to release *puis darrien continuance. Jones and Matthews v. Herbert. Page 421*

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

A farmer gave a bill of sale of all his farming stock to secure a debt: the agent of the vendee took possession, and resided on the farm, while he converted the stock, but the vendor also continued to reside on the farm, and exercised acts of ownership over parts of the stock: Held, that the debt being *bond fide* due, and the bill of sale taken with a view to recover that debt, the jury were warranted in finding the bill of sale good against a judgement creditor taking the stock in execution. *Benton v. Thornhill, late Sheriff of Norfolk. 149*

FREIGHT.

And see CHARTER-PARTY, 1. COVENANT, 4. LIEN, 1.

G.

GAME.

1. One who finds game on his own ground, cannot justify pursuing it into the land of another. *Deane v. Clayton. 489*
2. Before the game in the hands of an unqualified person can be seized within a manor for the use of the lord or lady of the manor, the lord or lady must exercise on the specific case his or her judgement whether the person possessing the game is or is not unqualified.
3. But after such judgement exercised, the lord or lady may take the game by the hands of another.
4. In trespass for taking hares where the Defendant justified seizing them by command of the lord of the manor, and for his use, within the manor, as being found in the possession of an unqualified person, and the Plaintiff traversed the

the command, held, that the command to be proved, to maintain the issue, must be such a command as would legally authorize the seizure; and that evidence of a wrongful command would not maintain the issue. *Bird v. Dale*. Page 560

5. An exception in a conveyance, made in 1655, of the free liberty of hawking and hunting, does not include the liberty of shooting feathered game with a gun. 614

6. *Seemle*, that the liberty of hawking and hunting for the grantee, his friends, and servants, is a tenement, and entailable. *Moore v. Earl of Plymouth*. 614

GOODS BARGAINED AND SOLD.

See STATUTE OF FRAUDS, 4.

GOODS AND CHATTELS, PROPERTY IN.

1. The obtaining goods upon false pretences, under colour of purchasing them, does not change the property. 59

2. Where goods are delivered to a vendee at the wharf, who afterwards ships them there, no subsequent stoppage of the goods *in transitu* can take place. *Noble v. Adams*. *ib.*

3. Where a bankrupt sued for the benefit of his assignees, the Court refused to grant a new trial, unless his assignees would abide by the verdict, and become responsible for the costs. *Noble v. Adams*. *ib.*

4. After a contract for the sale of goods, and a written order on the wharfinger for delivery, communicated to the wharfinger and assented to by him, though no actual transfer be made in his books, the property passes to the vendee. *Lucas v. Dorrien*. 278

GOODS SOLD AND DELIVERED.

1. The price of fixtures to a house cannot be recovered under a declaration for goods sold and delivered. *Lee v. Risdon*. 188

2. The vendor of goods paid by a bill at one month after sight, given by the purchaser's banker for a larger sum than the price, the vendor paying the difference, is not, upon the bill's being dishonoured, precluded from recovering

against the buyer the price of the goods. *Fry v. Hill*. Page 597

3. Where a person who has contracted for the purchase of goods, offers to resell them as his own, whether this is proof of a delivery to himself, is a question for the jury. *Blenkinsop v. Clayton*. 597

H

HIGHWAY.

See EVIDENCE, II. 2, 3.

HOLIDAY.

See SEALER OF WRITS.

HORSE.

See NEW TRIAL, 1.

HUNDRED.

An action against the hundred for demolishing a mill may be brought more than twelve months after the demolishing. *Beatson and Others v. Rushforth*. 45

I

ILLEGAL CONTRACT.

1. The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the Plaintiff requires any aid from the illegal transaction to establish his case. 246

2. The Plaintiff laid an illegal wager with B., the Defendant assumed a part in the bet. The Plaintiff won; it was expected that B. would pay on a certain day, before which the Plaintiff, at the Defendant's request, because he was going to a distance, advanced to the Defendant his share of the winnings. B. died insolvent before the day, and the bet never was paid. Held that, inasmuch as the Plaintiff could not establish his case without the aid of the illegal wager in his proof, he could not recover. *Simpson v. Bloss*. 246

IMPARLANCE.

And see REGULÆ GENERALES, 1.

If process be returnable on the last return day

day of any term, and the Plaintiff deliver a declaration, with notice to plead on the return-day or the day following, and if the day next following the return be a Sunday, then on the second day after the return, the Defendant is not entitled to an imparlance. *Clew v. Atwood.* Page 70

INCLOSURE ACT.

And see FEIGNED ISSUE, 1.

INFANT.

If an infant Defendant appears by attorney, the Court will, at the instance of the Plaintiff, compel an amendment of the appearance by substituting a guardian. *Hindmarsh v. Chandler.* 488

INSOLVENT.

1. On a motion for the discharge of an insolvent debtor under the statute 48 G. 3. c. 123. s. 1., the rule is in the first instance only a rule *nisi*. *Neilson, Ex parte.* 37
2. The insolvent act 53 G. 3. c. 102. discharges a prisoner from the demands of such creditors only as are named in his schedule of creditors, notice of applying for discharge, and order of discharge. 179
3. And therefore his discharge does not interrupt the course of an action brought against him by a Plaintiff whose claim the prisoner has not included in his notice and schedule of creditors. *Baker v. Sydec.* 179
4. Upon application to discharge an insolvent debtor, the Court grants only a rule *nisi* in the first instance. *Magnay v. Gilkes.* 467

INSURANCE.

- I. *Of the Validity of the Insurance.*
- II. *Of the Effect of a valid Insurance.*
- III. *Of the Acts of the insured.*
- IV. *Return of Premium.*
- V. *Of the construction of particular Expressions in a Policy.*
- VI. *Of the relative rights of Assured, Broker, and Underwriter.*

II.

Upon a policy on hogsheads of sugar,

warranted against particular average, some part of the sugar in every hogshead being preserved, though less than three per cent. on the cargo, it was held that this could not be a total loss. *Hedburg v. Pearson.* Page 154

III.

And see PAYMENT OF MONEY INTO COURT.

1. If the assured, after subscription by the underwriter, strikes out with a pen the time of warranty of sailing, which stood in the body of a policy, and inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, he destroys the policy, and the underwriter is discharged from the original contract. *Fairlie and Others v. Christie.* 412
2. A vessel chartered to a port of America laden with salt, to bring home a return cargo of timber, entered the port during an embargo, under which it was permitted her upon the notification of the embargo to return with the cargo on board, or to discharge her cargo, and return in ballast. She discharged her cargo, remained eighteen months there till the embargo ceased, then shipped her homeward cargo, and was lost. Held that she was not bound, with relation to the underwriters on ship, to have returned with her cargo of salt, or to have sailed in ballast, and that the underwriters on ship were still liable. *Schroder and Another v. Thompson.* 462
3. A license to export must be more strictly conformed to than a license to import. 468
4. License for two vessels, navigated in any manner, and sailing under any flag, to proceed from England to Holland with specified goods, to cruise from one port of Holland to another, to land or load part of their cargoes at one or more places, as might be most suitable, and having completed their cargoes of specified goods, to proceed with the same to England, the license to be renewed on application by the parties at the return from each voyage, during six months. The exporter fearing the vigilance of the government in Holland, where his trade was contraband, delayed to export, until after the expiration

expiration of six months, and then sailed and was lost. Held, that the parties being in this country, and not applying for a renewed license, the adventure was not legalized by the original license; and an assurance thereon was void. *Tulloch v. Boyd.* Page 468

5. Under a license to export to a hostile country within a limited time, a ship clearing at the Custom-house in London on the day before the license expires, but delayed in the river by the breaking of a bowsprit, and consequently not obtaining her clearing note at Gravesend till two days after the expiration of the license, is not deemed to have exported within the time limited. 472
6. If a ship, licensed to export to a hostile country, do not sail within the time limited by the license, though she were delayed by an accident, she is not protected by the license. *ib.*
7. Difference between a license to export and a license to import: the former, if the time elapses, must be renewed, because the parties, being at home, can easily apply to renew. *Williams v. Marshall.* 468

VI.

Where a broker, indebted for premiums of insurance on policies subscribed by an underwriter, who had since become bankrupt, had a *del credere* commission on one of the policies, effected in the name, not of the broker, but the person expressed in the body thereof, the broker not being intrusted with the custody of the policy, whereon a loss happened before the bankruptcy, though the broker paid the loss to the assured before the commission: Held that he could not set off that loss against the premiums due to the assignees of the bankrupt. *Peele and Others, Assignees of Waddington, a Bankrupt, v. Northcote.* 478

INTEREST OF MONEY.

And see VENDOR AND PURCHASER, 4.

1. Upon a contract to replace stock, and pay dividends in the mean time, though the jury give damages for the

value of the stock, and the amount of the dividends, yet, upon affirmation in error of the judgement, the measure of increase is not the further dividends that may have accrued, but interest on the damages given as the value of the capital stock. *Dwyer v. Gurry and Others.* Page 14

2. Interest refused on affirmation in error of a judgement in an action on a judgement of a Court in Jamaica in an action for goods sold and delivered and interest on the price of the goods. 244
3. So, where the judgement of the Court below was in an action on an account stated, and for interest on the balances. *ib.*
4. The Court of Exchequer-Chamber does not, in the ordinary exercise of its discretion, give interest upon the evidence of affidavits, but only on that which appears on the record. *Doran v. O'Reilly.* [Printed as Anonymous.] *ib.*
5. The clause of *ac etiam* in bailable process points out the person against whom the action is to proceed. 458
6. Upon a bailable *capias* against two Defendants, with a clause of *ac etiam* against one, and affidavit of debt against one, the Plaintiff may regularly declare against that one only. *ib.*
7. And though the sheriff arrest the other also, that does not alter the denomination of the action. *Kervall v. William Fossett and Thomas Fossett.* *ib.*

J.

JOINT ACTION.

If two warrant an attorney to confess judgement against them, and one dies, judgement cannot be entered up against the other. *Raw v. Alderson.* 453

JUDGEMENT.

Though cases in the King's Bench are argued, and the opinion of the Court pronounced, in *Serjeants' Inn Hall*, in time of vacation, the judgement bears date of the ensuing term. *Cartwright v. Keely.* 192

JURY.

The jury may properly judge of the meaning

meaning of mercantile phrases in the letters of merchants. *Lucas and Others, Assignees of Doorman, a Bankrupt, v. Groning.* Page 164

JUSTICES OF THE PEACE.

1. Under the statute 24 G. 2. c. 24. §. 1. a notice of action given to a magistrate is sufficiently indorsed with the name of the attorney, if he indorse it with the initial letter of his Christian name, and with his surname and place of abode in words at length. 63
2. A justice of the peace committing for a contempt of himself in his office, cannot commit for punishment, unless by warrant in writing. *Mayhew v. Locke.* 63

K.

KING's COUNSEL.

See PROMOTIONS.

KING's SERJEANT.

See PROMOTIONS.

L.

LANDLORD AND TENANT.

See BANKRUPT, III. 2. COVENANT, 1, 2. PARTY-WALL, 1. PRACTICE, VII. 1. VENDOR AND PURCHASER, 1.

LEASE.

And see EXECUTOR, 1.

1. Where the lessee of a house, and his partner in trade, agreed to pay the lessor annually, during the residue of the lessee's term, 10 per cent. on the cost of new buildings, if the lessor would erect them: Held, 1. That this agreement was not required to be in writing by the statute of frauds. 157
2. That though the partner quitted the premises, he was liable on this collateral agreement during the residue of the term. *Hoby v. Roebuck and Palmer.* ib.

LEGACY.

See EXECUTOR, 1.

LICENSE.

1. Where a Defendant justifies a trespass for preventing a tortious act of the Plaintiff; if the Plaintiff relies on a license which rendered his act lawful, he ought to reply the license. *Taylor v. Smith.* Page 156
2. A beneficial license to be exercised upon land may be granted without deed, 374
3. And without writing. ib.
4. A license to be exercised upon land for twenty-one years, granted for a valuable consideration, and acted upon, cannot be countermanded. *Taylor v. Waters.* ib.
5. Whether an exception out of a grant reserved to one who has no estate enabling him to grant, shall operate as the license of the heir of the grantee, *quare.* *Moore v. Earl Plymouth.* 614

LICENSE TO TRADE.

See INSURANCE, III. 3, 4.

LIEN.

1. The owner of a vessel has no lien for the hire stipulated by charter-party for the voyage, on the goods shipped by the charterer; because the latter is the owner of the ship for the voyage, and the first owner has no possession of the ship or goods, without which there can be no lien. *Hutton and Others, Assignees of Strombom, a Bankrupt v. Bragg.* 14
- But see *Tate v. Meek, Easter Term 1818.* post. VIII.
2. A banker has no lien on muniments casually left in his shop after he has refused to advance money on them as a security. *Lucas and Others, Assignees of the Effects of Doorman, a Bankrupt, v. Dorrien and Others.* 270

LIMITATION OF ACTIONS.

To a demand for the charges of preparing an annuity-deed, the Defendant said, "I thought I had paid it at the time, but I have been in so much trouble since that I really do not recollect it." The Plaintiff answered, "You know the price of the annuity was paid you in a 1000*l.* bank-note, which you changed

changed at *Budcock's*." The Defendant made no answer: Held, that this was not a sufficient acknowledgement of the debt to deprive the Defendant of the benefit of his plea of the statute of limitations. *Hellings v. Shaw*. Page 608

LOCAL ACTION.

See VENUE.

M

MANOR.

See GAME, JUSTICES OF THE PEACE.

MARRIAGE-ARTICLES.

Bond reciting a marriage intended, and the wife's present and expectant property, and that in consideration thereof, and of love, and to make a provision for the wife and issue of the marriage, in case it should take effect, the husband had agreed to pay a sum to trustees, and also had agreed, that if at any time during his natural life he should be seized of any hereditaments in possession, he would, by such conveyances as counsel should advise, settle the same on the wife and issue of the marriage in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her, in case she should survive; and the condition was for payment of the sum to trustees, and also, that if the obligor should during life become seised of hereditaments, he should settle the same upon the wife and issue of the marriage as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite the better to make provision for her, in case she should survive the obligor. The husband had issue, survived the wife, and afterwards acquired lands, but made no settlement thereof on the issue: Held that the bond was not forfeited. *Prebble and Others v. Boghurst and Others*. 538

MEMORANDA, 1. 90. 126. 256. 257. 389.

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MISNOMER.

See CORPORATION, 1.

MONEY HAD AND RECEIVED.

Goods were consigned to two for sale by commission; upon a dissolution of partnership the sale was assumed by one: Held that after the sale he was rightly sued for money had and received, which action could not have been maintained against both, although an action for not accounting would have lain against both. *Wells and Another, Assignees of Fisher, v. Ross*. Page 403

MONEY LENT.

1. *Indebitatus assumpsit* by the husband for money lent to the wife, at the wife's request, cannot be supported. 432
2. But, for money lent to the wife at the husband's request, is good. *ib*.
3. So, for money lent to the Plaintiff and wife, at the request of the Plaintiff and wife; for the wife shall be rejected as surplusage. *Stone v. Macnair, in Error*. 432

N

NAVIGATION ACT.

See SOUTH-SEA COMPANY, 1, 2.

NEW ASSIGNMENT.

Where the Plaintiff in his declaration avers a single act of trespass, which the Defendant justifies, there can be no new assignment. *Taylor v. Smith*. 156.

NEW TRIAL.

And see BANKRUPT, III. 1.

1. The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, and the Court will not set aside a verdict for a preponderance of contrary evidence. *Lewis v. Peake*. 153
2. Notice of motion for a new trial must be given to the judge two whole days before moving, as well in cases where a point has been reserved at the trial, as
Z Z in

726 PAYMENT INTO COURT.

in other cases. *Sheldon and Others Assignees of Ischiefly, v. Roschild.*

Page 725

3. Where, upon the facts proved, an inference of law arises on a statute not recollected at the trial, the Court will sometimes grant a new trial, though the point was not taken below. *Ritchie v. Bowsfield.* 309

NOTICE OF ACTION.

See JUSTICES OF THE PEACE, 1.

O

OPERA-HOUSE.

See LICENSE, 2, 3. AUTHORITY, 2.

P

PAPER-BOOKS.

See DEMURRER.

PARTNER.

See BANKRUPT.

PARTY-WALL.

If the tenant of a house contract with a builder to rebuild a party-wall, without reference to the building act, the builder is entitled to be paid by him without observing the requisites for obtaining payment prescribed by that act. *Stuart v. Smith.* 158

PAYMENT INTO COURT.

1. Though a Defendant, by payment into Court, admits every cause of action stated, yet where the Plaintiff alleges in his declaration multifarious and inconsistent facts, as the grounds for one and the same claim, it is not competent for the Plaintiff to apply the Defendant's payment into court of a sum insufficient to meet all the demands alleged, as evidence to prove such one of the Plaintiff's grounds of recovery as the Plaintiff may elect; but he must prove his case by other evidence of the fact. 450

PLEADER.

2. The Plaintiff, on a policy on fish, free from average unless general, or the ship stranded, averred that the ship was stranded, bulged, damaged, and wrecked. The Defendant paid money into court generally. The Plaintiff offered the rule of Court for payment as evidence, 1. of a total loss, 2. of a stranding: Held that as the loss might, consistently with the declaration, accrue by other of the alleged causes than stranding, *c. g.* as a general average, the Plaintiff could not apply the payment into court as an admission of the total loss, or of the stranding. *Everith v. Bell.* Page 450

PEER.

See PRIVILEGE, 4.

PILOT ACT.

1. If a vessel which in compliance with the statute 52 G. 3. c. 39. has a pilot on board, runs down another ship, an action for the injury cannot by s. 30. be maintained against the master, but must be brought against the pilot. *Bennet v. Moitt.* 258
Contrà before the statute. *Bowcher v. Noidstrom. Ante.* I. 568
2. The pilot act 52 G. 3. c. 39. s. 30. which directs that no master or owner shall be answerable for loss or damage occasioned by misconduct or negligence of any pilot, does not confine the exemption to loss or damage happening to the piloted ship and cargo, but extends to damage done by that ship to others. *Ritchie v. Bowsfield.* 309

PLEA PUIS DARRIEN CONTINUANCE.

See FRAUD, 1.

PLEADER.

- I. *Of the Form of Action and Joinder of Actions.*
II. *Of the Parties thereto.*
III. *When particular Matters may be pleaded.*
IV. *Of Certainty in Pleading.*
V. *Of the Manner of Pleading in general.*
VI. *Of Title.*

VII. *Of*

- VII. *Of Surplusage.*
VIII. *What cured by Verdict.*

V.

And see REPLEVIN, 1, 2, 3, 4. TRESPASS, 1, 2.

1. Where a Plaintiff in his replication avers a record of the same Court, he may at once pray that the Court will inspect the record, without giving the Defendant an opportunity to rejoin by traversing the record, and making a perfect issue between the parties. *Jackson v. Wickes.* Page 30
2. In an action against the Hundred on the stat. 41 G. 3. c. 24., and 1 G. 1. st. 2. c. 5., to recover the damage sustained by the demolishing mills by persons unlawfully, riotously, and tumultuously assembled, it is not necessary to aver that the demolishing was felonious. *Beatson v. Rushforth.* 45
3. Plea of judgement recovered in an action on the case on promises, to the damage of the Defendant, is bad on general demurrer. 271
4. By the words "the said Court of the Bench," in a plea, the Court of Common Pleas shall be intended. *Mill v. Pollon.* *ib.*
5. The Defendant agreed, in consideration of ten sums, of 500*l.* each, to seal, on or before 18th September, ten *post obit* bonds and warrants of attorney to confess judgement, to be in such form, and to contain such clauses, as the Plaintiff's counsel should advise or require; and the Plaintiff agreed that he would, on receiving the bonds and warrants of attorney duly executed, pay the Defendant ten sums of 500*l.* And in case the Plaintiff should not find it convenient on 18th September to pay those sums, the bonds and warrants of attorney should, on that day, be delivered by the Defendant to T. W. as escrows, to be held until the Plaintiff should pay those sums. In declaring against the Defendant for not executing the bonds on 18th of September, it was, 1st, held sufficient to allege that the Plaintiff was ready and willing to pay on receiving the bonds, and ready to do all things on his part, without averring an actual

offer to pay, or readiness to accept the bonds. Page 314

6. 2dly, It was held unnecessary to aver that the Plaintiff's counsel had advised or required a certain bond, and notice to the Defendant. *Levy v. Lord Herbert.* *ib.*
7. Declaration on a warranty that, seed was good, "which the Defendant could warrant," held sufficient after verdict. *Button v. Corder.* 401

POWER.

Limitation of stock to the use of such person as S. C. should by her last will, or any writing or appointment in nature of a will, to be by her signed and published in the presence of and attested by two or more credible witnesses, appoint. An appointment by will was thus made: "These my last bequeaths, signed by me this 4th Feb. 1812, S. M., witness B. H. and J. H." The testatrix told each of the witnesses that that paper was her will: Held that this was not a sufficient execution of the power. *Moodie v. Reid and Others.* 355

PRACTICE.

- I. *Relative to Process.*
- II. *Arrest, Detainer, Bail, and Appearance.*
- III. *Pleadings, and Bill of Particulars.*
- IV. *Trial, Inquiry, and Evidence.*
- V. *Judgement, and Reference to the Prothonotary.*
- VI. *Execution.*
- VII. *Staying and setting aside Proceedings.*
- VIII. *Costs.*
- IX. *Waver of Irregularity.*
- X. *Writ of Error.*
- XI. *Of Motions.*

I.

1. A *capias* directed into one county cannot be regularly served in another county, although it happen that the same officer is filazer for both counties. 233
 2. So, a *capias* directed into Kent cannot be well served in the cinque ports. *Williams and Another v. Gregg.* 233
- Z Z 2

II.

And see BOND, I.

1. Where a Plaintiff sued in person, and his residence was unknown to the Defendant, and his servant refused to disclose it, the Court ordered that the affixing a notice of allowance of bail, and notice of this rule, in the prothonotary's office, should be good service. *Ward v. Nethercote.* Page 145

III.

1. In an action against a magistrate for assault and false imprisonment, after the general issue pleaded the Court will permit the Defendant to withdraw his plea and pay money into Court, pleading *de novo*. *Devaynes v. Boys.* 33
2. A Defendant in this Court may withdraw his plea, and plead *de novo* on terms, if the Court think it a fit case for such indulgence. *Free v. Hawkins.* 270
3. Where a Defendant has obtained time to plead, and failed to plead within the time given, no subsequent rule to plead is necessary, previous to the Plaintiff's signing Judgement for want of a plea. *Donne v. Marsh.* 587
4. And that, although the time to plead expires in the preceding term, and the Plaintiff do not sign judgement till the subsequent term. 587

IV.

1. Motions to regulate the trial must be made, not to the Court, but to the Judge who presides at *nisi prius*. 386
2. As, a motion to try a cause at a sittings in term, notwithstanding a special jury obtained by the opposite party for delay. *Johnson and Others v. The Coke and Gas Light Company.* 386
3. An undertaking to accept short notice of trial for the sittings after term, given when there is not time for short notice of trial at the sittings, does not compel the Defendant to accept short notice of trial at the adjourned sittings. *Abbott v. Abbott.* 452

VII.

1. Where a landlord defending, defrays the costs of an ejectment in the name

- of an illiterate tenant, who gives a *re-traxit* of the plea and *cognovit* of the action, the Court will set aside the *re-traxit* and *cognovit*, and permit the lessor to defend as landlord. *Doe, on Demise of Locke, v. Franklin.* Page 9
2. A *cognovit* given after process sued out, and before declaration, is good. *Webb and Another v. Aspinall.* 701
 3. The rule requiring the presence of an attorney for the Defendant upon the giving of a warrant of attorney by a Defendant in custody extends to *cognovits.* *ib.*
- S. P. *Arnold v. Lowe.* 703

PRIVILEGE.

See VENUE, I.

1. An arrest within the verge of the palace is no ground for discharging the Defendant out of custody. *Sparks v. Spink.* 311
2. Where the mayor of a corporation summons a corporator to attend a corporate meeting for the purpose of an election in obedience to a writ of mandamus, which is understood to be addressed to the mayor solely, and not to the class of corporate officers to which a Defendant belongs, the Defendant, if arrested while in attendance on that election, will not be discharged from his bail-bond on motion. *Nixon v. Burt. Reed v. Burt.* 682
3. Especially if there be ground to suspect collusion. *ib.*
4. If an Irish peer is sued by bill, this Court will not stay the proceedings on motion, but will put him to plead his privilege in abatement. *Davis v. Lord Rendlesham.* 679

PROCEEDINGS, OF STAYING AND SETTING ASIDE.

See PRACTICE, VII.

PROCESS.

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PROMISSORY NOTES.

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PROMOTIONS.

<i>Firth, Wm., Esq.,</i> made a Serjeant.	
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<i>Garrow, Sir William,</i> Knight, appointed Puisne Baron of the Exchequer.	389
<i>Gifford, Robert, Esq.,</i> appointed Solicitor- General.	90
<i>Gurney, John, Esq.,</i> made King's Counsel.	126
<i>Hullock, John, Esq.,</i> made a Serjeant.	1
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<i>Onslow, Arthur,</i> Serjeant at Law, appoint- ed King's Serjeant.	126
<i>Richards, Sir Richard,</i> Knight, appointed Lord Chief Baron of the Exchequer.	389
<i>Shepherd, Sir Samuel,</i> Knight, appointed Attorney-General.	90

PROPERTY-TAX.

1. Where the assignee of a term gave up to *Michaelmas* to a second assignee the occupation of a house, and afterwards paid three quarters of a year's landlord's property-tax, due at *Michaelmas*, and handed over the receipt to the succeeding occupier, it was held that the succeeding occupier paying two quarters of a year's rent accruing at the following *Christmas*, might tender in part of his rent the receipt for property-tax given to the former occupier. 50
2. And might plead it as a payment made by himself. *Clennel v. Read and Another.* 50

PURCHASER.

See VENDOR AND PURCHASER.

R

RECOGNIZANCE.

See EJECTMENT, 1, 2, 3.

REGULÆ GENERALES.

1. Upon all process returnable the last return of any term, if the Plaintiff declares in *London* or *Middlesex*, and the Defendant lives within twenty miles of *London*, the Defendant shall plead within four days after declaration filed or

delivered with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered on the day of such return, or on the day next after such return, in case the same, *i. e.* the return-day, shall not happen on a *Sunday*; in which case the Plaintiff shall have the whole of the day following to file or deliver such declaration as aforesaid. And in case the Plaintiff declares in any other county, or the Defendant lives above twenty miles from *London*, the Defendants shall plead within eight days after the declaration filed or delivered with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered as aforesaid. And it is further ordered, That the rules now in force respecting the times of declaring and pleading upon any process returnable the first, second, or third return of any term, shall also extend to the fourth return of *Easter term*. *Hilary term*, 55 G. 3. Page 71

2. All rules and orders for *supersedeas* to discharge Defendants out of custody of the warden of the *Fleet*, or other custody, shall be filed with the prothonotaries of the court, upon their signing the writ of *supersedeas*. *Easter term*, 57 G. 3. 551

RELEASE.

See CONDITION, 1. FRAUD, 1.

REPAIRS.

See COVENANT, 1, 2, 3. ACTION ON THE CASE, 1, 2.

REPLEVIN.

1. In avowing for rent under the statute 41 G. 2. c. 19. it is not necessary to aver that the rent continued in arrear at the time of the making avowry or consuance. 72
2. In replevin for taking the Plaintiff's goods in a dwelling-house, the Defendant made consuance of the taking as a distress for rent due upon a demise to the Plaintiff. Plea, that at the time of the demise and rent accrued the Defendant was covert of *J. C.*, then her husband: Held that it must be intended that the husband continued living at the

the time of the distress taken, and that therefore the goods could not be the Plaintiff's, but her husband's, and so she had no ground of action. *Page 72*

3. In replevin, an avowry or consuance for rent admits the property of the goods in the Plaintiff. *ib.*
4. But if the Plaintiff's plea subsequently shows the property of the goods to be in another, the plaintiff cannot maintain the action. *Clarke v. Davies.* *ib.*
5. A plea by a surety that a judgement was obtained against his principal by fraud, viz. by the Plaintiff in that suit fraudulently procuring the Defendant to confess, and by the Defendant falsely and fraudulently confessing the action, without averring more, is bad. *97*
6. The parties to a replevin suit referred to arbitration the time of payment of the rent, with certain claims of the tenant on the landlord for damages, with liberty for the tenant to deduct them, when awarded, from the rent, and agreed to suspend proceedings in replevin pending the reference. After award made, held that the sureties in the replevin bond were not thereby discharged. *Moore v. Bowmaker.* *ib.*
7. A declaration in replevin for taking divers goods and chattles of the Plaintiff is bad for uncertainty. *642*
8. And although judgement pass by default for the Plaintiff, the defect is not cured by the statute of jeofails, 4 *Ann. c. 16. Pope v. Tillman.* *642*

REPLEVIN-BOND.

1. It is no plea in debt on a replevin-bond, that the bond purported to be entered into by two sureties, but is executed only by the Defendant. *Austin v. Howard.* *28*
2. *Semble*, that if a sheriff take a replevin-bond with one surety, and after judgement in replevin for a return, the return fail to be made, whereon the party distraining recovers in an action against the sheriff for taking insufficient pledges, the sheriff cannot recover against the single surety more than a moiety of the sum composed of the rent, which the party distraining establishes in the replevin-suit to be due, and the costs of that replevin-suit. *327*
3. Whether a bond taken by the sheriff

upon making replevin, but not in all points conformably to the directions of the statute 11 *G. 3. c. 19.* be assignable, *quære. Austin v. Howard.* *Page 327*

RULE OF COURT.

1. Where a Defendant, consenting to a Judge's order, obtains a benefit under it, the Court will, upon the order being afterwards made a rule of Court, enforce by attachment the Defendant's performance of such terms of the rule as are beneficial to the Plaintiff. *43*
2. Or to the crown, in a *qui tam* action. *Hart, qui tam, v. Draper.* *ib.*

S

SEALER OF WRITS.

The sealer of writs is not guilty of a contempt in refusing to seal a writ on *St. Luke's* day, being one of the holidays appointed by the statute 5 and 6 *Edw. 6. c. 3.* to be observed. *Martin v. Bold.* *182*

SEAMAN'S WAGES.

1. In an action for seaman's wages, it is not a part of the proof incumbent on the Plaintiff to show that his ship earned freight. *Brown v. Milner and Another.* *319*
2. If the Defendant would disaffirm the Plaintiff's right to wages, he must prove the negative proposition, that the ship earned no freight. *ib.*

SERJEANT AT LAW.

See COURT OF CHANCERY, 1. PROMOTIONS.

SERJEANTS' INN HALL.

See JUDGEMENT, 1.

SET-OFF.

See INSURANCE, 6.

SHERIFF.

See EXECUTION, 2. EVIDENCE, II. 1.

1. Where a lessor, with the permission of a bailiff who had made for her a distress for rent, commenced, in the bailiff's

iff's name, an action against the sheriff for taking insufficient pledges, and the bailiff afterwards, without the lessor's privity, released to the sheriff, the Court set aside the release, and a plea thereof *puis darrien continuance*. *Hickey v. Burt.* Page 48

2. The Court will not compel the sheriff to try a right between two conflicting parties, but will compel the party suing him to indemnify him. *King and Others, Assignees of Waine, v. Bridges.* 294

SHIP.

And see LIEN, 1.

1. Where the owner of a ship, by his contract, places the entire vessel for a time under the sole control of the freighter, during that time any act of the owner of the vessel done in fraud of the freighter is an act of barratry. *Soures and Another v. Thornton.* 627
2. The words "let to freight and hire" are not essential in order to constitute the freighter sole owner for the time. *ib.*
3. A covenant by the owner to carry 100 tons for the freighter from P. to O., at 6*l.* per ton, and a covenant by the freighter that the commander might fill up the vessel with any other goods on freight, the commander agreeing that the freighter should have the preference of shipping the other goods, if the freighter fills up the vessel, he becomes complete owner for the time, and a loss by the act of the original owner, is a loss by barratry. *ib.*

SLANDER.

1. The words "She is a great thief; she ought to have been transported," are not in substance proved by evidence of the words "she is a damned bad one; she ought to have been transported." 205
2. The words "she ought to have been transported," expressing only the opinion of the speaker, are not of themselves actionable. *Hancock v. Winter.* *ib.*
3. At least, unless connected by *innuendo* with a *colloquium* of felony. By *Burrough, J.* *ib.*
4. No action lies for these words, "I will take him to Bow-street, on a charge of

forgery," without *innuendo*. *Harrison v. King in Error.* Page 431

SOUTH-SEA COMPANY.

1. The statute 42 G. 3. c. 77. made it legal for British ships to trade to the western coast of South America, although they in no degree resorted thither for the purpose of fishing, without license from the South-Sea Company. *Gill and Another v. Dunlop.* 193
2. The statute 45 G. 3. c. 34. made it lawful, during the war, for British subjects to employ the ships of states in amity, under a license from the king in council, to bring goods, under certain restrictions, from the western coast of South America, that being a coast from which British-built ships might import such goods. *ib.*
Reversed in Error. 1 *Burnewall and Alderson.* 334

STAMPS.

And see PRACTICE, IV.

1. Where a judgement had been entered up, on a warrant of attorney given on an insufficient stamp, the Court held that the objection was cured by procuring the instrument to be stamped with the proper stamp. *Burton v. Kirby.* 174
2. And that, although the Defendant had already applied to the Court to set aside the judgement. *ib.*

STATUTE OF FRAUDS.

1. Where the lessee of a house, and his partner in trade, agreed to pay the lessor annually, during the residue of the lessee's term, 10 per cent. on the cost of new buildings, if the lessor would erect them: Held, 1. That this agreement was not required by the statute of frauds to be in writing. *Hoby v. Roebuck and Palmer.* 157
2. That though the partner quitted the premises, he was liable on this collateral agreement during the residue of the term. *ib.*
3. The statute of frauds does not exclude parol evidence that a written contract for the sale of goods, purporting to be made between A. the seller, and B. the buyer

732 STATUTE OF LIMITATIONS.

buyer, was on B.'s part made by him only as agent for *C. Wilson and Others, Assignees of Clarke, a Bankrupt, and Another, v. Hart.* Page 295

4. A purchaser of goods draws the edge of a shilling over the hand of the vendor, and returns the money into his own pocket, which in the north of England is called the striking off a bargain, this is not a part payment within the statute of frauds. *Blenkinsop v. Clayton.* 597

STATUTE OF LIMITATIONS.

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STAYING AND SETTING ASIDE PROCEEDINGS.

See PRACTICE, IX.

STOPPAGE IN TRANSITU.

1. Where goods are delivered to a vendee at a wharf, who afterwards ships them there, no subsequent stoppage of the goods *in transitu* can take place. *Noble v. Adams.* 59
2. If

TRESPASS.

2. If a carrier after notice from the vendor of goods to stop them *in transitu*, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee. *Litt and Another v. Cowley and Others.* Page 169
3. And though, the vendee having become a bankrupt, the goods have passed into the hands of his assignees, yet, inasmuch as they did not come to the possession of the bankrupt with the consent of the true owner, they are not in the order and disposition of the bankrupt within the statute 21 Jac. 1. c. 19. s. 21. *Litt. and Another v. Cowley and Others.* 169

SUBSTITUTED CONTRACT.

See COVENANT, 4.

SUPERSEDEAS.

And see REGULA GENERALIS, 2.

The prothonotary, making out a writ of *supersedeas* upon perfecting bail, is in future to retain the order for the *supersedeas* which is exhibited to him as his instructions for the writ. *Lock v. Craddock.* 437

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TENDER.

1. Upon a bare covenant for the payment of money, the defendant may plead a tender. 486
2. Whether, on a plea of tender, the Defendant's perpetual readiness to pay be traversable, *quare.* *Johnson v. Clay. ib.*

TENEMENT.

Semble, that the liberty for the grantee his friends and servants, of hawking and hunting, is a tenement, and entailable. *Moore v. Earl of Plymouth.* 614

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1. Where the Plaintiff in his declaration avers a single act of trespass which the Defendant justifies, there can be no new assignment. 156

VENDOR AND PURCHASER. 733

2. Where a Defendant justifies a trespass for preventing a tortious act of the Plaintiff, if the Plaintiff relies on a license which rendered his act lawful, he ought to reply the license. *Taylor v. Smigh.* Page 156
3. It is a direct trespass to injure the person of another by driving a carriage against the carriage wherein such person is sitting, although the last-mentioned carriage be not the property nor in the possession of the person injured. *Hopper and Wife v. Reeve.* 698

TURNPIKES.

See ACTION, 1.

V

VARIANCE.

And see COVENANT, 1. ANNUITY, 2.

In an action for maliciously suing out a commission of bankrupt against the Plaintiffs, surviving partners of *Edmund Darby*, as the fact was, an averment that the commission was superseded, is not proved by a writ of *supersedeas* to supersede a commission against the Plaintiffs as the surviving partners of *Edward Darby.* *Matthews and Another v. Dickinson.* 399

(*Vide last item of errata.*)

VENDOR AND PURCHASER.

1. It is incumbent on the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment. *Mason v. Corder.* 9
2. Under a contract for the purchase of the residue of an old term, a purchaser is not bound to accept a similar new lease; for the former differs in value from the latter, the residue of an old term being in certain respects more advantageous. *ib.*
But see *Staines v. Morris.* 1 Ves. & Beames. 8., that the purchaser of an old term is by an implied term of his contract compellable, in equity, to indemnify the vendor: wherefore the difference

ence between the remainder of an old term and a new lease, in respect of the covenants, consists rather in form than substance; but in respect of a condition in restraint of alienation, for ever destroyed by license to the lessee to alienate, the difference is substantial.

3. Where the purchaser at an auction of a reversionary interest in bank stock, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, held that he might nevertheless recover interest on the deposit in an action against the vendor for not completing his contract, under an averment of special damage in the Plaintiff's losing, by reason of the non-performance, the interest and benefit of his money. *Farquhar v. Farley.* Page 592

VENUE.

1. Where an attorney has waved his privilege to sue in *Middlesex*, by laying the venue in another county, he cannot avail himself of his privilege to amend by changing the venue to *Middlesex*. *Lewis one, &c. v. Shelly.* 146
2. If the Plaintiff lays his action in the county of *A.*, where no part of the cause arose, and the Defendant moves to change it on the usual affidavit that the cause of action arose in the county of *B.*, and not elsewhere, which the Plaintiff falsifies by an affidavit that the cause of action partly arose in the county of *B.* and partly in the county of *C.*, the Plaintiff may retain the venue upon an alternative undertaking to give material evidence either in *A.*, where the cause did not arise, or in *C.*, where it did arise. *Powel v. Rich.* 178
3. The Court will not change the venue in an action upon any written instrument; the exception not being confined to promissory notes and bills of exchange. *Morrice v. Hurry and Another.* 306
4. The venue may be changed to a city on the usual affidavit, after which the party may on motion have a *venire* to the sheriff of the next adjoining county. *Bird v. Morse.* 385
5. Where the venue is laid in a county palatine, and after writ of inquiry executed, and final judgement signed, a

WEST-INDIA DOCK-WARRANTS.

writ of error is brought, and error assigned for want of an original, the Court will not amend the declaration by changing the venue. *Millington v. Goodwin.* 466

W

WAGER.

See ILLEGAL CONTRACT.

WARRANT OF ATTORNEY,

And see JOINT ACTION, 1.

1. The omission to indorse a defeazance on a warrant of attorney is a cause of censure on the attorney who prepares it, but does not avoid the warrant or judgement. *Partridge v. Fraser and Another.* 307
2. A Plaintiff who, having the joint security of two Defendants, has engaged not to proceed hostilely against the parties, unless he conceives there is danger of their failure, is at liberty, on the increase of his risk by the failure of one, immediately to enforce his judgement against the other. *ib.*

WARRANTY.

See DAMAGES, MEASURE OF.

WASTE LAND.

See EVIDENCE, II. 2.

WEST-INDIA DOCK-WARRANTS.

1. The pawnee of coffees, lodged in the *West-India* Docks and entered there in the pawnee's name, gave up to the pawnor certain delivery-notes thereof, called Dock-warrants, having indorsed them with an order for the delivery of the goods to —, in exchange, not for cash, which he might have had, but for a check for the debt on the pawnor's banker, which check was dishonoured: the pawnor, having contracted to sell the goods to the Plaintiffs, received payment for them, and gave to the Plaintiffs the delivery-notes, with the blank above the Defendant's signature for the name of the person to whom they were to be delivered: Held, 1. That the Defendant having

having entrusted the pawnor with his signature to a blank, purporting to authorize the delivery of the goods, and enabled him thereby to induce faith to a contract for the sale of the goods, and to obtain payment for them from the Plaintiff, it must be considered that the contract of sale was the Defendant's contract, and the payment, a payment to the Defendant. *Zwinger v. Samuda.*

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2. The Court (*Park, J., dissentiente*) guarded against any inference that, according to a practice which has obtained since the erection of the *West-India*

Docks, an indorsement on these delivery-notes or dock-warrants was, of itself, and without making the wharfingers parties to the order, capable of transferring any property in the goods therein described.

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3. Whether an indorsement of the delivery-checks or warrants of the *West-India* Docks will pass the property in the goods therein mentioned. *Lucas v. Dorrien*

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WITNESS.

See EVIDENCE, I.

END OF THE SEVENTH VOLUME.

